

THE UNIVERSITY OF CHICAGO

REGULATING REPUTATION IN CHINA:
PRIVACY, FALSEHOODS, AND SOCIAL CREDIT

A DISSERTATION SUBMITTED TO
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For my family.

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Writing the acknowledgments section is widely recognized as the best part of writing a dissertation. To make sure the best of the best part is saved for the very last, let me say first that, with utmost sincerity, all errors are mine. Generally speaking, thanking people for contributing to one's own written work can be a clever way to imply that others bear secondary liability for such work's shortcomings. But that really is not what I mean with the below.

With that caveat, I want to thank first Professor Tom Ginsburg and Professor Lior Strahilevitz for advising me on this dissertation project. Their own scholarship has in many ways inspired the entire project, and their always thoughtful and enlightening comments and suggestions have significantly shaped the agenda, structure, and presentation of the three articles included in these pages. Importantly, their kindness, patience, and generosity have also motivated me to strive to finish this dissertation sooner than later; I constantly blame myself for having diverted so much of their precious time from being put to other more socially productive use.

One other factor motivating me not to drag my JSD studies any longer is the new policy adopted by the University of Chicago Law School last summer that JSD students no longer get tuition waivers if they do not finish after five years in the program. Given that financially I should be able to afford the Chicago JSD tuition (not substantial as compared with the JD tuition, to be fair) for another year or two, the new policy from my perspective is more in the nature of a nudge rather than a hard push. Here I am providing a case that attests to the effectiveness of such nudge.

Aside from its paternalistic policies, there are many other things about this Law School, allegedly ruled by libertarians, that I am deeply grateful for. Professors Daniel Abebe, Chris Fennell, Anup Malani, Tom Miles, and other faculty members at the Law School have helped me with the dissertation project in various ways, such as pointing directions, answering specific questions, and commenting on drafts. More generally, having the opportunity to closely observe how Chicago scholars operate in and outside of the classrooms and workshops on a daily basis is such an invaluable experience that, were I asked to, I would have been more than happy to pay out of pocket for it, perhaps at least in the amount of the JSD tuition. A truly humbling place, the Law School has reminded and will continue to remind me in the years to come of how far an intellectual distance I still have to travel from where I am to where I should aspire to be.

Besides other kind assistance, I thank Dean Richard Badger for his help five years ago that made it possible for me to study in the JSD program. To keep the story vague and suspicious enough, when I first considered applying for Chicago's program in 2013 I was technically not eligible; Dean Badger sorted something out so that I applied and got in, and nothing he did then, I think, was illegal. This opportunity for me to study in Chicago has also led to much-treasured friendship, especially that with my fellow JSD students, whose presence was most indispensable at the lunch workshops because that had me reassured that I was not regularly crashing faculty-only parties.

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China, law journal editors almost universally edit out the acknowledgments from the articles in their published form, and as a result my contribution to my friends' work rarely gets printed. Hopefully that somehow mitigates the injustice I am doing to them here. Special thanks are due, nonetheless, to Professor Zhu Suli, for his inspiration and encouragement over all these years, and to Professor Sang Benqian, for chaperoning me through the start of my academic career and making it so much easier than it would otherwise have been.

Without the generous help from my colleagues and students at the Ocean University of China, I cannot imagine how I would have been able to juggle through the past five years my teaching responsibilities and the JSD work.

Through the last thirty years, my parents have unconditionally and in all ways possible supported me to pursue my interest, which is going to school. I can never do enough to pay them back. They probably are happier now that I am finally not registered somewhere as a student anymore. I will just keep hiding from them the truth that a job in the academia, in fact, is not so much different from being a student for the rest of one's life.

My wife and in-laws joined my support team before I started working on the JSD. The sacrifice they have since made for me wakes me up at night,¹ as I constantly wonder for what do I deserve their selfless love. My wife, in particular, suspended her promising career in finance to move to Chicago with me in those two years I stayed in residence. Through attending a humanities program at the English Department of the

¹ Figuratively, as I generally sleep quite well.

University, she became more determined that finance is her thing. Heartfelt thanks to the English Department to absolve me from feeling guilty to my family for not choosing to work for a better-paying job.

My daughter was born in the middle of my second year in the JSD program. She has since added tremendously to the workload all members of our family have to share among ourselves. I, of course, have shouldered only the least substantial part. But still for the past three years or so my daughter has distracted me quite much from focusing on my dissertation work, because most of all she is just too cute for me to ignore. That said, there are probably two things I should thank my daughter for: First, time spent with her must have generally contributed to my mental health; second, every time after playing with her for say an hour or so I become so eager to return to my desk and work.

DISSERTATION OVERVIEW

This J.S.D dissertation consists of three articles that critically examine a series of important and intriguing institutional developments in contemporary China in relation to its regulation of the social and informational practices of reputation.

With the rise of powerful technologies that have dramatically augmented the human society's collective memory, the economic and political stakes in who gets a good reputation and who gets a bad one are growing ever higher. Scholarly literature in law and social science for the most recent decade has considered the proliferation of reputation information and reputation systems as driven primarily by market and technological forces, with practices such as credit reporting and consumer feedback being the paradigmatic and most popularly referenced examples. Through such a market-centered lens, the making and breaking of a person or an entity's reputation are dependent to the greatest part upon how such reputation subject's information becomes accessed and processed by other players in the relevant business and social transactional context.

Where the market-based reputation systems function well, both theories and real-world experiences have established that they improve efficiency in the broader socio-economic system in which they are embedded. But since the reputation market from time to time could "fail," at least in the sense that many in the society may find unsatisfactory or even objectionable the pattern in which good and bad reputation ends up being allocated, the question of whether and how legal intervention is needed for addressing those apparent failures will then naturally arise to become topical in public

discourse.

In fact, notwithstanding the dominance of the market-centered discourse in recent literature, the law has never been absent from the scenes of reputation. For centuries, legal regulation has cast its shadow over reputation by policing boundaries for the various types of underlying informational and social practices. In modern Western societies, for example, the two best-known pillars of the legal structure that regulates reputation must be the law of defamation and that of privacy. Defamation law generally seeks to address a range of information problems that can be caused by falsehoods. As it concerns reputation, such regulation conceivably answers to such common problem that some who “deserve” a better name fall victim to attacks by falsehoods, whereas others, having little “actual” ground for a good name, nonetheless manage to procure one through misleading self-promotion or utter lies. Privacy law, meanwhile, is often tasked with dealing with a different, though related, situation. It regulates the extent to which truthful, and yet most often discreditable, information may become accessed against one’s will and as a result negatively affect such person’s reputation. The profound and yet subtle assumption underlying privacy law’s regulation is that at least some limit against non-consensual disclosure of personal information is proper because reputation based on full disclosure is not necessarily what the society really wants.

At first blush, it should appear quite intuitive as to how defamation and privacy law may lend useful support to functional reputation systems, which presumably would operate in the most optimal fashion if and when information processed into reputation is not only truthful but also relevant to what the society legitimately cares about.

Lawyers have known all too well, however, that these institutional attempts at regulating the work and effect of information are inherently complicated. In the Western legal contexts, legal restrictions against the dissemination of either truthful or false information have persistently been challenged on both legitimacy and practicability grounds. Most of all, since any claim of authority by the state over what's true or what's appropriate can expect to face skepticism that is deep-seated in the background liberal political tradition, contemporary Western legal systems have overall taken a reactive approach to regulating the market-based process of reputation production and dissemination. In general terms, such approach is appreciated as being not only prudential but also principled. Nonetheless, as technologies bring about novel disruptions, illustrated by such phenomenon as massive leaks of personal privacy and organizationally engineered, widespread, and increasingly targeted falsehoods, there is also no question that the perceived need for intervention has been growing.

What could happen to reputation and its embedded information ecosystem if legal regulation shifts to a more interventionist paradigm? Scholars from the West today have often speculated about the plausible hopes and perils of such a prospect, but greater insights can be attained if related questions are explored in real-world cases as opposed to merely hypothetical scenarios. A real-world case of an interventionist regulatory paradigm in the contemporary world, as examined in this dissertation, is China. Compared with regimes premised on liberal principles, one profoundly different presumption for China's regulatory paradigm is that its Party-state has made persistent claims about its paramount authority for determining what's true, what's false, and

what's appropriate. Premised on such claim of authority, the Party-state has attempted at deploying a much wider range of legal and regulatory tools in pursuit of overt and strategic interventions to the production and distribution of reputation. As this dissertation studies these institutional practices, it aims to put to test the extant understanding, formed largely from observing only the Western practices, about how the state, the law, and reputation interact and what could ensue from such interaction.

The first article, included in this dissertation as Chapter One, examines how China's privacy law and regulation operate to make and break reputation for different classes of the society's public figures. A somewhat "dated" topic in privacy scholarship notwithstanding, public figure privacy continues to provide an accessible window through which one can most effectively learn about the meaning and stake of privacy in a given society. In contemporary China, as in elsewhere, privacy protection, and the lack thereof, have played an important role in the making of the "haves" and "have-nots" in the society's reputation landscape. The article demonstrates how privacy's cultural logic and operational structure in China echo in some aspects whereas differ in others from the familiar paradigms in historical and present Western privacy regimes. Its analysis of the Chinese public figure privacy law reveals an unconventional paradigm in which privacy functions, in quite explicit a fashion, as a strategic policy lever for the Party-state to intervene into the market of reputation with a view to solidifying its control over the elites and its moral authority over the general society.

The second article, included in this dissertation as Chapter Two, examines how China has sought to use a collection of legal and regulatory tools to tackle the problem

of networked falsehoods, which poses a looming threat to the integrity of not only the reputation market but also the sphere of public discourse overall. Despite an apparent recent surge in research interest, out of free speech concerns, most American lawyers have remained reluctant to consider serious proposals for legal intervention into the networked falsehoods problem. Through studying the China case, this article aims to present how different paradigms of legal regulation could operate in the real world to affect related social behaviors, processes, and other dynamics. While China is often considered as a worst-case scenario for speech regulation, this case study illustrates how conventional concerns against regulating networked falsehoods calls for re-evaluation. In particular, unlike commonly presumed, the Chinese state's nominally draconian information restrictions, as it has to operate against a suite of counter-veiling forces, have for the large part of the new millennium left substantial room for effective public discourse. Although certainly not being presented as a model for the West, the China case is highly informative as the West proceeds with its own intricate debates over free speech, information policy, and Internet governance.

China's overtly interventionist stance, as illustrated by its approaches to regulating privacy and falsehood problems, suggests that the Party-state is keen on pressing its visible hand on the reputation market that otherwise is thought as primarily regulated by an invisible one. That said, privacy and falsehood regulation, however aggressive, could still be more indirect than the state may desire as it comes to reputation. Instead, a conceptually more radical step the state could take is to directly define what's a good or bad reputation and decide who gets which according to such officially determined

reputation. The third article, included as Chapter Three, documents a recent development in China's law and policy arena that in essence foreshadows a state-centered reputation regime in such nature.

Since the early 2000's, China has gradually rolled out a massive policy plan for building a "social credit system" (the "SCSP") for the country, which as the government envisioned consists primarily of using reputation mechanisms such as blacklisting, rating, and scoring to tackle many of the country's intractable social and economic governance problems. Although Western government actors have also explored using reputation technologies and mechanisms in governance and social control contexts, China's SCSP, as a comprehensive, singularly framed, and actively implemented policy project, knows no equivalent elsewhere in the world, and thus offers a unique case for studying a larger, paradigmatic shift in reputation from the "reputation society" to the "reputation state." While much about the project remains in flux at this point, findings from this first systematic case study show how the efficacy and risk of government-dominated reputation practices in this nature could be fundamentally shaped and also limited by many of the institutional and market forces that motivate it in the first place. That said, however, if future institutional arrangements and technological progress could align to overcome the present challenges, the reputation state effected through the SCSP does have the potential to change law and government as we know them in China and beyond.

As the dissertation posits the rise of the reputation state to be a plausible trend for law and governance for the future, it may be worth noting that the state administering

reputation systems under its direct control is, in fact, a very ancient political practice. For over two thousand years, the Chinese imperial governments had administered a complex and constantly evolving system through which commendable deeds of individuals and households were not only rewarded but also officially memorialized so that the relevant individuals, family members, and their descendants become eligible for preferential treatments in the future. One should note, for the matter of course, that official practices of a similar nature are prevalent in the history of English and continental European monarchies.

In likely over-simplistic terms, what the modern history had witnessed was first the decline of these centralized, state institutions of reputation and subsequently, in their replacement, the rise of market-based, decentralized reputation. In particular, as the mass media rose in modern times, the state had apparently retreated to a relatively more reactive mode and relied on such tools as privacy and defamation to police reputation concerns caused by dynamics in the market. Arrives then our present time, however, when novel technological solutions could embolden the state to engage in increasingly interventionist regulation and to drive reputation towards a new paradigm of centralization. Many theorists in the West have more or less sensed and even pondered on such prospect, but it is in China that we now have the opportunity to observe a somewhat condensed yet realistic version of how this progress may unfold. This dissertation thus contributes to the literature a critical case study that has important implications for theoretical and empirical explorations on a much larger scale.

CHAPTER ONE

PRIVACY, REPUTATION, AND CONTROL: PUBLIC FIGURE PRIVACY LAW IN TWENTY-FIRST CENTURY CHINA

I. INTRODUCTION

Privacy law, as it regulates the nonconsensual disclosure of personal life, is instrumental to how reputation in human society becomes created, destroyed, and redistributed. In the contemporary Chinese society, such valuable assets as respect, goodwill, and positive personal images, as in elsewhere and in other times, are not distributed in an egalitarian fashion. Privacy protection, and the lack thereof, has played an important role in the making of the “haves” and “have-nots” in reputation landscape of twenty-first century China. At this point, however, such role of privacy is yet to be fully accounted for in the legal literature.¹

This Article examines how privacy law exerts its impact on regulating reputation in contemporary China, and the focus here is on the classical and yet perennially intriguing problem of public figure privacy. Expectedly, the story of how Chinese law protects, –and in many occasions, refuses to protect–, its famous and influential is full of cultural intricacies. But the core lesson here must readily jump to the eyes should the story-telling start with the following three landmark cases.

The first case flashes back to the last century: In 1987, one year after the People’s

¹ Earlier considerations about cognate issues, *see e.g.* Hilary K. Josephs, *Defamation, Invasion of Privacy, and the Press in the People’s Republic of China*, 11 UCLA PAC. BASIN L.J. 191 (1993); Benjamin L. Liebman, *Scandal, Sukyandaru, and Chouwen*, 106 MICH. L. REV. 1041 (2008).

Republic enacted its first law that codifies a personal right of reputation,² Ms. Yang Mo, a well-established, then septuagenarian novelist who had also held high ranking positions within the Chinese government's cultural management system, sued a magazine for damaging her reputation by publishing an article about her "first love" (hereinafter the "*Yang Mo Case*").³ Yang Mo prevailed in court to have the publisher retract the article and apologize to her, despite her alleged reputation harm may have been, as some commentators even back then would point out, questionable: The article, after all, was written in a very flattery tone;⁴ moreover, Yang's most acclaimed, half-autobiographical novel in the 1950's, *Song of Youth*, was well-known to include storylines about extra-marital romance based on her own life experience.⁵

Fast forward to the year of 2008, Ms. Yang Lijuan, a zealous fan of the Hong Kong pop star Andy Lau, sued a nationally influential newspaper, *Southern Weekly*, for its coverage of Yang and her parents. The family made a fateful journey from rural northwestern China to Hong Kong so that Ms. Yang could see Lau in person, and the journey consummated in tragedy as Yang's father committed suicide after her request to meet Lau for the second time –and to marry him– was turned down. Neither did Yang Lijuan's privacy suit fare any better than her marriage proposal. As the courts decided,

² Zhonghua Renmin Gonghe Guo Minfa Tongze (中华人民共和国民法通则) [PRC GENERAL PRINCIPLES OF CIVIL LAW (1986)], §101 (providing that "individual citizens and legal persons enjoy a right to reputation.")

³ More extensive description about the *Yang Mo* case, see Josephs, *supra* note 1 at 207-10 (1993).

⁴ See e.g. Pang Zhanqiu (庞战秋), Lun Xinwen Qin Hai Mingyu Quan de Lian Biao Zhun (论新闻侵害名誉权的立案标准) [*On Filing Standards for Reputation Cases Against the Press*], Dangdai Faxue (当代法学) [CONTEMPORARY LEGAL SCIENCE], no.3, 1990 at 44.

⁵ Josephs, *supra* note 1 at 210.

Yang and her mother must tolerate the press coverage, which detailed the Yang family's long and bizarre history of dysfunctions and troubles,⁶ because the Yangs have made themselves "voluntary public figures" whose privacy interest must then yield to the public's curiosity.⁷

Then in 2014, Ms. Yang Jikang (better known by her pen name "Yang Jiang"), a famed author and translator and then widow of the even better renowned literary intellectual, Qian Zhongshu, won her case in the Beijing court at the age of 102. Upon her knowledge that scores of letters the Qian/Yang couple and their late daughter wrote a long-time family friend were put up for public auction, Yang sued the friend and the auction agency on both copyright and privacy grounds.⁸ Given the Qian/Yang family's

⁶ Yuan Lei (袁蕾), Ni Buhui Dongde Wo Shangbei Yang Lijuan Shijian Guancha (你不会懂得我伤悲——杨丽娟事件观察) [*You Won't Understand My Sorrow: Perspectives on the Yang Lijuan Saga*], Nanfang Zhoumo (南方周末) [SOUTHERN WEEKLY] (Dec. 18, 2007), <http://www.infzm.com/content/trs/raw/17441> (reporting that Yang's family had its long history of dysfunctions, including such detail as that Yang's father used to physically brawl with his brother over the romantic relationship with Yang's mother, that the father may have even killed his own mother, and that Yang's mother engaged in serial adulterous relationships)

⁷ More precisely, the Guangzhou courts made identical rulings in three separately filed cases, concerning claims filed by Yang Lijuan on behalf of herself, Yang Lijuan on behalf of her deceased father, and Yang's mother Tao Juying, against Southern Weekly, that were subsequently combined to become dispensed in a joint procedure. See Yang Lijuan yu Nanfang Zhoumo Baoshe deng Mingyu Quan Jiufen Shagnsu An (杨丽娟与南方周末报社等名誉权纠纷上诉案) [*Appellate Decision on Reputation Dispute between Yang Lijuan and Southern Weekly*] (2008); Yang Lijuan Dai Yang Qinji yu Nanfang Zhoumo Baoshe deng Mingyu Quan Jiufen Shagnsu An (杨丽娟(代杨勤冀)与南方周末报社等名誉权纠纷上诉案) [*Appellate Decision on Reputation Dispute between Yang Lijuan qua Yang Qinji and Southern Weekly*] (2008); Tao Juying yu Nanfang Zhoumo Baoshe deng Mingyu Quan Jiufen Shagnsu An (陶菊英与南方周末报社等名誉权纠纷上诉案) [*Appellate Decision on Reputation Dispute between Tao Juying and Southern Weekly*] (2008). In the following the three cases, as combined, will be referred to as the "**Yang Lijuan Case.**"

⁸ See Zhongmao Shengjia Guoji Paimai Youxian Gongsi Su Yang Jikang (Biming Yang Jiang) deng Qin Hai Zhuzuoquan Ji Yinsi Quan Jiufen An (中贸圣佳国际拍卖有限公司诉杨季康(笔名杨绛)等侵害著作权及隐私权纠纷案) [*Appellate Decision*

status as a symbol of high culture in the contemporary Chinese society, public interest in the academic and aesthetic value in those letters should have been too obvious for an average educated Chinese to miss. But the Beijing courts in their opinions did not even consider the “public figure” argument as bearing any relevance, and they found without any difficulty that both the friend and the auction agency violated Yang’s right to privacy.⁹

What may explain the different fates the three Ms. Yangs (unrelated to each other), all public figures, met in the Chinese courts? They sued in different times, of course, and throughout the years China’s civil law of privacy had undergone important changes.¹⁰ But at least for those more familiar with the background social contexts of these cases, what’s also notable is that the three Yangs are of different social status: Yang Mo is not only a famed intellectual but also a senior and high-ranking party-state official; Yang Lijuan is a nobody who dares to thrust herself into the media sensation; and Yang Jikang is a dignitary with halo and regarded somehow as the modern day relic of China’s exalted traditional literati class. As this Article argues, the divergent protections different public figures receive under Chinese law may be understood

on Copyright and Privacy Disputes between Zhongmao Shengjia International Auctioning Agency Ltd., Co. and Yang Jikang (pen name Yang Jiang) (2014) (hereinafter the “**Yang Jikang Case**”).

⁹ Besides Yang’s claim about her own privacy, she also sued as the widow of Qian for the disclosure of the latter’s private letters, as under Chinese law family members of the deceased have the right to claim damage for emotional distress caused by unauthorized publication of private matters of the deceased. Art.3, Zuigao Renmin Fayuan Guanyu Queding Minshi Qinquan Jingshen Sunhai Peichang Zeren Ruogan Wenti de Jieshi (最高人民法院关于确定民事侵权精神损害赔偿责任若干问题的解释) [NPC INTERPRETIVE RULES ON CIVIL DAMAGES FOR EMOTIONAL HARMS]

¹⁰ See *infra* text accompanying notes 20-31.

through the lens of an overarching approach to public figure privacy problems that, in a rather characteristic fashion, assigns institutional resources of privacy protection according to the particular public figure class to which an individual is deemed to belong.

Lawyers operating in the Western legal contexts must be generally familiar with one or more versions of status-based public figure privacy laws. In both modern U.S. and European jurisdictions, not only are public figures as a general group accorded relatively less privacy protection than private figures, but the law also more or less tries to differentiate the legal treatment among subgroups of public figures.¹¹ Nonetheless, as comparatists have long noted, how public figures are overall defined, sub-classified, and protected varies from one society to another. For example, in U.S. law, privacy protections for almost all public figures, ranging from politicians, entertainment celebrities, child prodigies, to rape victims, are often reduced significantly as compared with private figures.¹² Although the U.S. courts have developed such fluid jurisprudential categories as “voluntary versus involuntary” and “all-purpose versus limited” public figures in the adjacent context of defamation,¹³ the concept of “newsworthiness” has held back privacy protections for virtually all kinds of public

¹¹ See generally Scott. J. Shackelford, *Fragile Merchandise: A Comparative Analysis of the Privacy Rights for Public Figures*, 49 AM. BUS. L.J. 125, 138-88 (2012).

¹² See e.g. *Nader v. General Motors Corp.*, 25 N.Y.2d 560 (1970); *Bartnicki v. Vopper* 532 U.S. 514 (2001); *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940); *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989). Also see William Prosser, *Privacy*, 48 CAL. L. REV. 383, 411 (1960) (“Such public figures are held to have lost, to some extent at least, their right of privacy”).

¹³ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

figures.¹⁴ In European jurisdictions, by contrast, public figures overall receive more robust legal protection than their U.S. counterparts.¹⁵ Further, countries like Germany have developed a more clearly defined system of categorization that operates to allow for different levels of control over one's intimate sphere for government officials, celebrities, and individuals temporarily under the spotlight.¹⁶ Such trans-Atlantic divergence in U.S. and European privacy law has long fascinated scholars to explore its cultural and institutional causes and consequences.¹⁷

Compared with those of the U.S. and European legal systems, the contemporary Chinese approach to public figure privacy law is distinct in both its formal features and underlying cultural and political logic. Despite a notable recent growth in the literature on Chinese privacy law,¹⁸ much work is yet to be done with respect to describing and explaining these features and logic against China's contemporary legal and social context. In this Article, my first objective is to produce a descriptive account of China's status-based public figure privacy regime. Through examining leading court cases and relevant regulatory practices, this Article reveals key characteristics of the Chinese

¹⁴ Shackelford, *supra* note 11 at 155 (noting that the U.S. courts have been stretching the bounds of what it means to seek media attention).

¹⁵ *Id.* at 191-98 (describing that the ECHR jurisprudence has evolved to recognizing privacy rights for all kinds of public figures).

¹⁶ *Id.* at 185-88.

¹⁷ See e.g. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004); Lior Jacob Strahilevitz, *Towards a Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010, 2013-18 (2013).

¹⁸ See e.g. Josephs, *supra* note 1; Jianyuan Yang, *Media Disclosure of Individual Privacy: A Proposed Framework for China*, 3 E. ASIA L. REV. 59 (2008); Ann Bartow, *Privacy Laws and Privacy Levers: Online Surveillance Versus Economic Development in the People's Republic of China*, 74 OHIO ST. L.J. 853 (2013); Weiwei Shen, *Online Privacy and Online Speech: The Problem of the Human Flesh Search Engine*, 12 U. PENN. ASIAN L. REV. 268 (2016).

privacy regime. Overall, the Chinese regime is more protective of government officials than even the European jurisdictions do, at least until the Party-state decides to purge them from the official ranks. Meanwhile, it is also often *laissez-faire* in similar ways as the U.S. law does with respect to famous individuals outside of the government system, but with notable exceptions for those, like Yang Jikang, who have attained an exalted status in the realm of high culture. Furthermore, as the *Yang Lijuan Case* tellingly illustrates, the Chinese law can be conspicuously hostile towards those ordinary citizens who dare walk into the limelight.

The impact such paradigm of public figure privacy law may have had on China's reputation landscape is conceivably regressive because greater institutional resources for privacy protection are being allocated to the politically powerful and culturally established. Beyond the intuitive yet over-simplistic factor of hypocrisy, this Article explains that underlying China's regressive, status-based privacy regime is a lasting, albeit evolving, cultural tradition that tends to associate privacy protection with a hierarchical system of moral outlook.

Notwithstanding the importance of culture, this Article further argues that China's privacy regulation must also be understood as embedded in the country's political context. And as the status-based privacy regime produces disparate reputational consequences, it creates incentives for the different kinds of public figures with respect to how to talk and behave in the society. Through its privacy law, the ruling Party-state may then exert a level of control over a diverse network of elites, whom the Party-state considers as agents for upholding its political and moral authority and implementing its

social control agenda. Such agency control perspective affords a novel lens for us to understand China's privacy regime in the new millennium which, as this Article suggests, may have stemmed from an intricate political process as the Chinese state strategically responds to rising challenges from increasingly powerful and competing market and social forces over the production of information, fame, and influence.

The rest of this Article proceeds as follows. Part II develops the descriptive account of China's law in action that consists of divergent approaches to protecting privacy for such different types of public figures as government officials, popular celebrities, cultural dignitaries, and voluntary figures. Part III explains how an overarching cultural outlook, termed here as "moral elitism," may have continuously lent normative support to China's status-based privacy regime in the contemporary context. Part IV argues that China's status-based privacy regime takes shape and persists also, and importantly, because it functions as a useful instrumentality for the Party-state to control elites and defend its own cultural and moral authority. This Article concludes briefly after Part IV.

II. PUBLIC FIGURE PRIVACY LAW IN CHINA: THE LAW IN ACTION

A. Background and Heuristic Framework

Public figure privacy is a body of law that is harder to comprehensively describe than it first appears. Even for modern U.S. law, whose approach to the matter is notorious for lacking subtleties, such general contention as "public figures have their privacy interest reduced or forfeited" could still be readily disputed for missing some

of the inherent intricacies in the newsworthiness doctrine.¹⁹

Yet the descriptive challenge could be greater for analysts of China's public figure privacy law. Although varying notions of privacy could date back a thousand years in the Chinese cultural tradition, modern privacy law in China is young, and particularly so for the People's Republic established in 1949. In fact, in a legal system that enshrines codes and statutes as the most authoritative sources of legal norms, contemporary China's privacy law emerged primarily through judicial creation. In 1986, when China's first comprehensive civil code, the General Principles of Civil Law (the "GPCL"), was enacted, privacy was not enumerated as one among the codified "personality rights," such as those to one's name, likeness, reputation and honorary recognition.²⁰ Shortly after the GPCL went into effect in 1987, however, private litigants began to pursue privacy cases under the right of reputation provision,²¹ which subsequently led to the Chinese courts' two-decade practice of adjudicating privacy disputes via the conceptual

¹⁹ 1 GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS § 11:12, fn.2 (noting a variety of cases where courts apparently reject a bright-line approach that denies privacy protection based merely on the plaintiff's public figure status).

²⁰ Zhonghua Renmin Gonghe Guo Minfa Tongze (中华人民共和国民法通则) [PRC GPCL], §§99-102.

²¹ GPCL §101. For example, in 1987, in the very first publicized case of this sort, generally known as "*The Case of A Female Manager's Privacy in Diary*," the plaintiff sued the defendant for stealing and reading her diary and publicly disseminating materials about her love affairs based on the content of such diary, and the court decided against the defendants for violating the plaintiff's right of reputation. See Gu Jianhua (顾建华), Dui Yi Qi Feifa Xuanyang Taren Yinsi Anjian de Rendeng (对一起非法宣扬他人隐私案件的认定) [On A Case About Illegally Disseminating Privacy of Others], Renmin Sifa (人民司法) [People's Judiciary], no.8, 1988 at 27-28. Another famous privacy case in 1998 was *Two Art Models v. The Organisers of the Exhibition* (1988). See Guobin Zhu, *The Right to Privacy: An Emerging Right in Chinese Law*, 18 STATUTE L. REV. 208, 213 (1997).

vehicle of reputation right.²² Only till 2009 had the national legislature²³ made the infringement on the “right to privacy” as a standalone basis for a tort claim,²⁴ and then in 2017 elevated the right to privacy as a specific, codified civil law right in the General Provisions of the Civil Law.²⁵

The concept of “public figures,” moreover, has never been formally written into China’s statutory law at all. Till this day, it has remained as one made through court jurisprudence that, in a code law system, carries relatively limited weight in the formal sense. The concept was introduced into China in the late 1980s and popularized in 1990s first as a matter of academic and advocacy interests.²⁶ Since the mid-1990s, Chinese lawyers had started to make, albeit unsuccessfully, the *New York Times Co. v.*

²² Nonetheless, it should be noted that through a set of judicial interpretive rules, the SPC in 2001 effectively recognized a legally actionable privacy interest, and in 2008 further revised its rules on case filing in 2008 to fully recognize “disputes over privacy right” as a separate civil course of action from “disputes over right of reputation.” See *Zuigao Renmin Fayuan Guanyu Queding Minshi Qinquan Jingshen Sunhai Peichang Zeren Ruogan Wenti de Jieshi* (最高人民法院关于确定民事侵权精神损害赔偿责任若干问题的解释) [SPC INTERPRETATION ON DETERMINING COMPENSATORY DAMAGES FOR EMOTIONAL HARMS IN CIVIL TORT CASES] (2001); *Minshi Anjian Anyou Guiding* (民事案件案由规定) [RULES ON CAUSES OF ACTIONS FOR CIVIL SUITS] (2008).

²³ Before the Tort Liability Law in 2009, a first explicit reference to the “right to privacy” as specifically applicable to women appeared in the Women’s Rights and Interests Protection Law of 2005. See *Funv Quanyi Baohu Fa* (妇女权益保障法) [WOMEN’S RIGHTS AND INTERESTS PROTECTION LAW] (2005), §42 (providing that women’s right to reputation, honor, and privacy be protected by the law).

²⁴ *Zhonghua Renmin Gonghe Guo Qinquan Zeren Fa* (中华人民共和国侵权责任法) [PRC TORT LIABILITY LAW] §2.

²⁵ *Zhonghua Renmin Gonghe Guo Minfa Zongze* (中华人民共和国民法总则) [PRC GENERAL PROVISIONS OF THE CIVIL LAW] §101

²⁶ Wei Yongzheng & Zhang Hongxia (魏永征、张鸿霞), *Kaocha Gongzhong Renwu Gainian zai Zhongguo Dazhong Meijie Feibang Anjian Zhong de Yingyong* (“考察‘公众人物’概念在中国大众媒介诽谤案件中的应用”) [*A Study on the Application of Legal Concept “Public Figure” in Cases of Chinese Media Libel*], *Zhongguo Chuanmei Baogao* (中国传媒报告) [CHINA MEDIA REPORT], no. 4, 2007 at 4.

Sullivan-style argument when defending the press in defamation suits.²⁷ The Chinese courts, meanwhile, accepted such defense first in 2002 when a Shanghai court ruled against a famous soccer player who sued a newspaper for an article implicating his involvement in game fixing.²⁸ The public figure defense has since been invoked by many media as well as other types of defendants in reputation right suits concerning both defamation and privacy, with some successful in swaying the court whereas others not. Nonetheless, despite proposals from the legal academia, such provision did not make it into formally enacted code laws.²⁹ And although academics have recommended a greater level of systemization, such as clarifying the judicial definition for “public figures,”³⁰ the Chinese courts have not taken up such task but instead generally presented themselves as balancing on a case-by-case basis a person’s privacy

²⁷ See Ding Xiaoyan (丁晓燕), *Lun Xinwen Mingyu Qinquan Anjian Zhong dui Gongzhong Renwu de Fanxiang Qingxie Baohu* (论新闻名誉侵权案件中公众人物的反向倾斜保护) [On Reduced Protection for Public Figures in Cases of Reputation Tort by Press], *Renmin Sifa* (人民司法) [People’s Judiciary], no. 4, 2004 at 45 (noting that in previous 20 years before the *Fan Zhiyi Case* the press typically lost their defense against public figures).

²⁸ *Fan Zhiyi Su Wenhui Xinmin Lianhe Baoye Jituan An* (范志毅诉文汇新民联合报业集团案) [Case of Fanzhiyi Against Wenhui Xinmin United Press Group] (2002) (hereinafter the *Fan Zhiyi Case*).

²⁹ See Ding Xiaoyan (丁晓燕), *supra* note 27 at 46 (citing news report that Chinese legal scholars used to propose the inclusion in the civil law of a specific clause exempting the press from tort liability when they report on the public figure privacy, but such proposal was turned down by the legislative body).

³⁰ Wang Liming (王利明), *Gongzhong Renwu Renge Quan de Xianzhi he Baohu* (公众人物人格权的限制和保护) [*Limits on and Protection of Personality Rights of Public Figures*], *Zhongzhou Xuekan* (中州学刊) [Zhongzhou Academic Journal], no.2, 2005 at 92 (proposing to define public figures by listing the major types as “government officials; leaders of public interest organizations; celebrities in culture, arts, entertainment and sports; literary authors, scientists, famous scholars, model workers and other luminaries”).

interest and the public interest in such information.³¹

Against such backdrop, my approach here to developing the descriptive account will focus primarily on sketching the basic, operational structure of law in action as opposed to detailing the semantic niceties in the formal doctrines. That first means, methodology-wise, that influential court cases, in particular those after China's first public figure case of 2002, will serve in this Article as a primal point of observation for discernable legal norms.³² Meanwhile, outside of the courts, as China's government authorities constantly intervene in media and communication with a pervasive web of regulations and policies, these regulations and policies as relevant are also consulted as sources of institutional rules on privacy.

More importantly, the law in action approach also means that this Article looks primarily into the law's result and function, and by examining the court decisions and governmental regulatory practices, the objective is to uncover how, if at all, the different types of public figures are being treated differently. To this end, this Article in the following adopts a workable heuristic framework that descriptively catalogs four

³¹ See e.g. court decisions in the *Yang Lijuan* case; the *Yang Jikang* case; and the *Bai Jing* case.

³² Such an approach is in some sense similar to the mode of studying the positive common law. China, for sure, does not have a case law system, but in recent years there have been notable and formal measures being implemented by the court authorities to give a set of officially selected cases, known as the "Guiding Cases," quasi-precedent effect. That development reflects a more general trend over the past four decades during which the court system essentially played the role of a mini-legislature to make a variety of rules in a range of formalities, which arguably do not exist in the extant legislative text. See *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213 (2016). In such areas as the law of public figures, in particular, studying the court cases provide the best available clue to figuring out the positive law in China.

general approaches to regulating public figure privacy matters, which for shorthand are referenced here as the “media property rule”, the “property rule,” the “liability rule,” and the “inalienability rule.” Obviously, these short-hands are inspired by concepts from the famous Calabresi & Melamed model, which theorizes that any legal entitlement, once assigned, may in the abstract be considered as being protected by property rules, liability rules, or inalienability rules.³³ When an entitlement is protected by property rules, the remedies of injunction or significant penalty damages will apply to prevent third-party extraction or other types of transfer of such entitlement to which the owner does not consent. When liability rules apply, in contrast, the owner of the entitlement may not prevent an involuntary transfer of entitlement from taking place, but can seek compensation representing an objectively determined price. When an entitlement is subject to inalienability rules, meanwhile, the owner is forbidden from making even a voluntary transfer of such entitlement to any third party.³⁴

The C&M framework has become widely popularized in legal analyses, including a number of works on information privacy law.³⁵ The study of public figure privacy issues may have been one area where the C&M concepts are much less used,³⁶ perhaps

³³ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972).

³⁴ *Id.* at 1092-1110.

³⁵ See e.g. LESSIG, CODE 2.0 159-62, 229 (2006); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1294, n.316 (1998); Nicolas P. Terry, *Physicians and Patients Who “Friend” or “Tweet”*: *Constructing A Legal Framework for Social Networking in A Highly Regulated Domain*, 43 IND. L. REV. 285, 299 (2010); Ignacio N. Cofone, *The Dynamic Effect of Information Privacy Law*, 18 MINN. J.L. SCI. & TECH. 517, 542-55 (2017).

³⁶ In the only one piece known, Claus Ott & Hans-Bernd Schafer described and explained how and why German law shifted in the twentieth century from protecting privacy with a regime based on liability rules to one on property rules, and as

because these issues are considered too intricate for such a rather simplistic conceptual structure to effectively capture. However, the elusiveness in the formal doctrines may call for the exact kind of heuristic tools that bypass the law's semantic façade and help us keep focused on key types of plausible arrangements.

As adapted from Calabresi & Melamed's original concepts, in this Article, the "media property rule" for public figure privacy describes the regulatory approach that a public figure by virtue of his or her status receives limited to no protection of privacy interests. That approach resembles how, as typically understood, the "public figure doctrine" in its most robust form would operate, such as illustrated in the U.S. case law where, as the law has overall developed, courts tend to give overwhelming weight to public curiosity and be highly deferential to the media in broadly defining "newsworthiness".³⁷

The "property rule," as it applies to public figure privacy, grant individuals a high level of control over whether and how his or her private information becomes publicized. The legal system may undergird such control through both court injunctions and government regulatory actions that seek to implement censorship in either *ex ante* form of publication restrictions or *ex post* form of take-downs or "right to be forgotten"

empirical illustrations they considered some public figure privacy cases in Germany. See Claus Ott & Hans-Bernd Schafer, *The Dichotomy between Property Rules and Liability Rules: Experiences from German Law* (November 2, 2009). 1 ERASMUS L. REV. 41 (2008).

³⁷ See Simon J. Frankel, Laura Brookover, Stephen Satterfield, *Famous for Fifteen People: Celebrity, Newsworthiness, and Fraley v. Facebook*, 64 STAN. L. REV. ONLINE 82, 83-86 (2012) (describing how the U.S. courts' approach to determining newsworthiness has evolved over time towards greater deference to the interest of public attention).

type of remedies.³⁸ Moreover, as Ott & Schafer noted, property rule protection for privacy entitlement can also be achieved sometimes through the deterrence effect of monetary damages, in particular punitive damages, that are substantial enough to offset and outweigh the potential infringers' expected gains.³⁹

The "liability rule" here refers to the regulatory approach that public figures are allowed remedies for privacy and reputation harm in the form of monetary compensation, which however often under-compensates and is also inadequate to deter *ex ante* nonconsensual disclosure. In privacy suits, as long as punitive damages are not granted, under-compensation should be the norm as opposed to exception given that it is notoriously difficult for the courts to measure the subjective and emotional loss from reputation harm. That said, it is worth noting that in the U.S. context liability rule protections afforded to celebrities in the right of publicity suits do enable big shots in the league of Dustin Hoffman, the Beatles, and Michael Jordan to recover millions.⁴⁰

Finally, when the "inalienability rule" applies, a willing individual can be prevented from seeking publicity, notoriety, or other self-benefits by disclosing to the public his or her private information. To impose such an information regime would ostensibly defy the general principle of individual autonomy and free expression. But presumably out of externality and paternalism concerns, legal rules do exist in most

³⁸ See Michael J. Kelly & David Satola, *The Right to Be Forgotten*, 2017 U. ILL. L. REV. 1 (2017) ("The right to be forgotten refers to the ability of individuals to erase, limit, delink, delete, or correct personal information on the Internet that is misleading, embarrassing, irrelevant, or anachronistic.").

³⁹ Ott & Schafer, *supra* note 36 at 54.

⁴⁰ J. THOMAS MCCARTHY, *THE RIGHT OF PUBLICITY AND PRIVACY* 773-74 (2d. 2017).

jurisdictions against at least some form of voluntary self-disclosure, such as those prohibiting the public display of private body parts. Moreover, in scholarly discourse, there has also been an influential notion that in a liberal egalitarian society people need be somehow “coerced” to actively preserve their privacy rather than easily relinquish them.⁴¹

Media property rule	Property rule
“Public figure doctrine” in the most robust form	Judicial or administrative restrictions against publication; takedowns; the right to be forgotten remedies; punitive damages
Liability rule	Inalienability
Modest monetary compensation	Anti-nudity laws

Table 1.1: Four approaches to regulating public figure privacy, and examples

Critically, these four types of regulatory approaches⁴² differ in how much control

⁴¹ Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 740 (1999).

⁴² Aside from the four approaches as conceptualized above, those familiar with the C&M framework will likely consider if a regulatory approach modeled on “Rule Four” from the original C&M thesis may be plausible in the public figure privacy context. *See supra* note 33 at 1116-18. Conceptually, public figure privacy law modeled on “Rule Four” would have, on one hand, assigned to the media an entitlement to unauthorized disclosure and, on the other hand, enabled the information subject to enjoin the media from reporting provided that he or she pays the media for its loss resulting from abandoning or eliminating the story. While such is an interesting paradigm implied in the C&M framework adopted by this Article, in this following I will not consider the same further given its absence from the Chinese law in action. There has certainly been such practices in China that journalists extorting public figures and firms with damaging materials they collect and threaten to publicize. But as a matter of law such operations constitute criminal offenses of extortion under Chinese law and high profile prosecutions were brought about against some journalists and media organizations on this very ground. *See* 21 Shiji Baoxi Zongcai Shen Hao Deng Bei Pibu She Qiaozha Lesuo Shouhui Zhiwu Qinzhan Deng Zui (21 世纪报系总裁沈颢等被批捕，涉敲诈勒索受贿职务侵占等罪) [Twenty-First Century Press Group CEO Shen Hao and Others Arrested on Extortion, Bribery,

over disclosure the legal authorities accord to those individuals who are potential targets of public curiosity. In the following Section II.B., I document how, under China's contemporary privacy regime, divergent legal protections for control over privacy disclosure are in effect being applied to different types of public figures in China. Section II.C. then considers the law's plausible distributional effect on the societal landscape of reputation.

B. *Law in Action for China's Public Figures*

Before we start on describing the law in action, one more caveat to add is that in this Article I skip defining in the abstract who is and who is not a public figure under Chinese law, but instead proceed directly to discussing the several groups of individuals who are typically considered as such. As experiences from the U.S. and European laws should counsel, conceptual precision in this context is likely a futile pursuit. Besides the fact this Article is not centrally concerned with expounding formal doctrines, it should be evident as we proceed that a great deal can already be learned as we simply focus on the core while spare getting the peripherals perfectly defined.

In below I consider the privacy law in action for four groups of Chinese public figures, namely government officials, popular celebrities, cultural dignitaries, and voluntary public figures. These four groups may not exhaust all who are famous and influential in China, but they have been unquestionably the main concerns of the country's public figure privacy regime in the twenty-first century.⁴³ Despite the

and Misappropriation Charges], Peng Pai (澎湃) [THE PAPER], Nov. 20, 2014, https://www.thepaper.cn/newsDetail_forward_1279688.

⁴³ See *supra* note 30 (Wang Liming defining public figures in the Chinese context to

proclaimed judicial approach of case-by-case balancing, the following demonstrates that China's privacy regime can be practically identified as consisting of a distinct set of status-based, differential treatments for these different public figures.

1. Government officials

Government officials in China, as in elsewhere, are generally recognized as a presumptive group of public figures.⁴⁴ Nonetheless, the Chinese privacy regime differs prominently from that of the West for its approach to regulating privacy of government officials.

a. Property rule for the incumbents

In the United States, the privacy of political figures, including both electoral candidates and government officials, have long been understood as subject to a rather harsh media property rule.⁴⁵ In contrast, as many have correctly pointed out, the European jurisdictions have taken a relatively more nuanced and balanced approach to public figure privacy, and despite the general acknowledgement of the public interest

include primarily these types of individuals).

⁴⁴ *Id.*; Li Xintian & Zhengming (李新天、郑鸣), *Lun Zhongguo Gongzhong Renwu Yinsi Quan de Goujian* (论中国公众人物隐私权的构建) [*Constructing the Right to Privacy for Public Figures in China*], *Zhongguo Faxue* (中国法学) [CHINA LEGAL SCIENCE], no.5, 2005; Hong Bo & Li Yi (洪波、李轶), *Gongzhong Renwu de Panduan Biaozhun Leixing jiqi Mingyu Quan de Xianzhi yi Meiti Qinhai Gongzhong Renwu Mingyu Quan wei Zhongxin* (公众人物的判断标准、类型及其名誉权的限制——以媒体侵害公众人物名誉权为中心) [*Definition and Types of Public Figures and Limits to Their Reputation Rights: Focusing on Tort by Press*], *Dangdai Faxue* (当代法学) [CONTEMPORARY LEGAL SCIENCE], no. 7, 2006.

⁴⁵ *See* Warren & Brandeis, *supra* note [·] 214-5 (arguing in their ground-breaking piece that the first limit to the protection of the right to privacy should apply to public figures such as candidates for political offices); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 72 (1905).

in free speech and government transparency, the treatment to which political figures are subject in European jurisdictions could at times deviate considerably from the media property rule baseline.⁴⁶

In China, after the *Yang Mo Case* in 1987 the courts have not apparently had much chance to adjudicate another privacy claim filed by government officials while they are in office. In a rare and officially publicized case on point, a member of the national political consultant body, Mr. Cai Jiming, sued the Internet search giant Baidu after web users, mocking him for a legislative proposal he made, posted his phone numbers using the online discussion board services Baidu hosted.⁴⁷ Although the trial and appellate courts, reasoning that Mr. Cai was a public figure, did not entertain his request that Baidu shut down the entire discussion board set up by web users to mock Cai, they did find Baidu liable for not timely removing those web posts that publicized Cai's personal information. Such decisions suggest that despite Cai's public figure status, the Chinese courts consider a property rule as appropriate for protecting at least the core components of their privacy entitlements.

Nonetheless, as one may clearly observe when looking beyond the courtroom, for

⁴⁶ For well-known examples, Princess Caroline, the heir to the Monaco throne, were able to recover from publishers of her photos taken while dining in public. *Von Hannover v. Germany*, App. No. 59320/00, 40 EUR. H.R. REP. 1 (2004). Meanwhile, in France, the country's highest court has long taken the position that "everyone, regardless of rank, birth, fortune, or occupation, is entitled to a right of privacy," and such information of apparent public interest as the President's health conditions was nevertheless granted privacy protections. Shackelford, *supra* note 11 at 171, 181.

⁴⁷ Cai Jiming yu Baidu Gongsi Qin Hai Mingyu Quan Xiaoxiang Quan Xingming Quan Yinsi Quan Jiufen An (蔡继明与百度公司侵害名誉权、肖像权、姓名权、隐私权纠纷案) [Case of Disputes Over Rights to Reputation, Likeness, Name, and Privacy between Cai Jiming and Baidu Co., Ltd.] (2010) (hereinafter the *Cai Jiming Case*).

China's incumbent government officials, the property rule protection they receive derives primarily from a myriad of government regulations and practices that may effect media censorship and publicity restrictions. For example, since the early 1990s formal rules have been put in place by the propaganda authorities to require that any publication about the personal life of Chinese political elites among the highest echelon must go through a prescreening process.⁴⁸ In the age of the Internet and social media, meanwhile, journalistic reports on the life, family, and financial conditions of top leaders also continue to be stringently restricted and remains a major focus for China's Internet blocking and filtering practices. For example, speculative notwithstanding, it has been generally understood that China's blocking of the websites of such foreign media as New York Times and Wall Street Journal in the past decade was attributable not merely to the overall critical slant of their China coverage but to the specific reports

⁴⁸ In late 1980s, as popular publications about the "secret facts," or "privacy," of former and current senior Communist Party leaders became widely disseminated on the black market, the authorities after the Tiananmen Square episode reacted by dialing back on the previously loosened approach to censorship on this sort of "non-fictional" materials. *See* Guanyu Dui Miaoxie Dang he Guojia Zhuyao Lingdao Ren de Chuban Wu Jiaqiang Guanli de Guiding (关于对描写党和国家主要领导人的出版物加强管理的规定) [RULES ON PUBLICATIONS DEPICTING PRIMARY LEADERS OF THE PARTY AND THE STATE] (1990); Guanyu Fabiao he Chuban Youguan Dang he Guojia Zhuyao Lingdao Ren Gongzuo he Shenghuo Qingkuang Zuopin de Buchong Guiding (关于发表和出版有关党和国家主要领导人工作和生活情况作品的补充规定) [*Supplemental Rules on Publishing Works on the Professional and Life Matters of Primary Leaders of the Party and the State*] (1993); Xinwen Chuban Zongshu Tushu Qikan Yinxiang Zhipin Dianzi Chuban Wu Zhongda Xuanti Beian Banfa (新闻出版总署图书、期刊、音像制品、电子出版物重大选题备案办法) [RULES ON FILING FOR PAPER AND ELECTRONIC PUBLICATIONS ON IMPORTANT TOPICS] (1997). "Primary leaders" in this context include a rather small scope of highest ranking Party and state officials, such as former and present Standing Committee Members of the Politburo, President and Vice President of the State, Premier of the State Council, Chairman of the Standing Committee of the National People's Congress, Director of the Central Consulting Committee (no longer in existence), and the National Committee of the Chinese People's Political Consultative Conference.

they had run on the family wealth and corruption of the Communist Party's top leaders.⁴⁹

As a formal matter, legal regulation that expressly restricts the publication of officials' personal matters rarely covers lower level officials in the same way as the high-ranking leaders. Nonetheless, lower level officials have more or less room to mobilize censorship resources they have access to within a local or departmental jurisdiction so as to shield themselves from certain unwanted expose. For one instance, in the early 2010s, many local governments were reportedly imposing stringent restrictions against citizen inquiries into the registry information of local real estate ownership, which was viewed as a measure to protect unwanted disclosure about personal assets and wealth of government officials.⁵⁰ And in more egregious cases, government officials were also found to have sought intimidation and deterrence against investigative journalists with harassment, obstructions, and even criminal prosecutions.⁵¹ Given the relative robustness of these techniques in restricting

⁴⁹ Keith Bradsher, *China Blocks Web Access to Times After Article*, NY Times (Oct. 25, 2012), <https://www.nytimes.com/2012/10/26/world/asia/china-blocks-web-access-to-new-york-times.html>; William Wan, *China blocks New York Times Web Site After Report on Leader's Wealth*, WASH. PO. (Oct. 26, 2012), https://www.washingtonpost.com/world/asia_pacific/china-blocks-new-york-times-web-site-after-report-on-leaders-wealth/2012/10/25/a94707a8-1f02-11e2-ba31-3083ca97c314_story.html?utm_term=.f2c3e24c8c9b.

⁵⁰ As an online discussion session hosted by the Communist Party's official news website reveals, the societal opinions at the time diverged with respect to whether government officials' privacy interest in their personal asset holdings should be protected against public inquiries to such property registries. See Guanyuan Yinsi Quan he Gongzhong Zhiqing Quan Gai Youxian Baohu Na Yige (官员隐私权和公众知情权, 该优先保护哪一个) [*Which of the Officials' Privacy Interest and the Public's Right to Know Should Take Precedent?*], Zhongguo Gongchan Dang Xinwen Wang (中国共产党新闻网) [CCP NEWS] (Apr. 24, 2013), <http://dangjian.people.com.cn/n/2013/0424/c117092-21264123.html>.

⁵¹ For widely reported incidents of officials seeking to crack down on investigative

disclosure and dissemination of unsavory facts, we may conclude that Chinese government officials in power, by virtue of their greater access to censorship resources, are often having their privacy entitlements protected by the property rule.

b. Media property rule for the fallen

The property rule protection for officials may cease to apply, however, when they become determined as transgressors of the party lines and consequently purged from the official ranks. In these situations, an approach closer to the media property rule will instead apply to them, and through their corruption investigations, charges and trials the relevant officials' personal life could become much more open for intense public scrutiny than when they were in office.

In the most recent wave of anti-graft campaigns since 2012, for example, thousands of former officials prosecuted for corruption charges have faced consequences of not only party disciplines and criminal laws but also public shaming.⁵² Most illustratively, the official announcements made in connection with these cases

journalists in possession of their expose materials, *see e.g.* Keira Lu Hang, *Jailed and Refused Bail, Chinese Investigative Journalist Detained After Exposing High Profile Corruption Scandal*, SCMP (Oct. 19, 2015), <http://www.scmp.com/news/china/policies-politics/article/1869018/fears-chinese-crackdown-after-journalist-held-suspicion>; *China Journalist Arrested After Exposing Corruption*, BBC NEWS (Oct. 10, 2013), <http://www.bbc.com/news/world-asia-24476615>.

⁵² Such practice dates of course back to much earlier in China's recent history. As some legal scholars recall, the Chinese government's practice of using public media to expose adulterous relationship of former government officials prosecuted for corruption could date at least back to 1987. *See* Rengequan yu Xinwen Qinquan (人格权与新闻侵权) [PERSONALITY RIGHTS AND THE TORT BY PRESS] (Wang Liming & Yang Lixin (王利明、杨立新) eds, 2009) at 613 (noting one such case in 1987 involving a deputy provincial governor convicted for corruption-related charges).

almost invariably state how these individuals indulged themselves with “power-sex exchanges” with multiple women (or, in a smaller number of cases on female officials, men).⁵³ In the high profile trial of Bo Xilai, the charismatic former party chief of Chongqing and once a popularly expected contender for the top leadership position, Bo was even made to admit in open court his knowledge about his wife’s extramarital affairs, which culturally is an intolerable ordeal for Chinese men.⁵⁴ Such treatment strikes an extremely stark contrast to how well Bo, while in power, was capable of polishing his public image as not only a powerful, energetic, sophisticated, and nationally influential party leader but also a family man with a dedicated wife and a high-achieving son.⁵⁵

For obvious reasons, fallen officials in China very rarely file privacy suits in court with respect to the humiliating publicity that is often endorsed, or at least acquiesced, by the authorities. In one outlier case, which took place in 2004, Yin Donggui, a female former mayor of Zaoyang City in Hubei Province, sued a provincial newspaper for

⁵³ In 2014, as the Party Disciplinary authorities announced the sanctions against two female officials of Shanxi Province, the announcements for the first time included the phrase of “engaging in adultery with others” as they concern female officials. Shanxi She Tongjian Nv Guanyuan Zhang Xiuping Bei Daibu (山西涉通奸女官员张秀萍被逮捕) [*Shanxi Female Official Zhang Xiuping, Accused of Adultery, Was Arrested*], Renmin Wang (人民网) [PEOPLE.COM.CN] (Nov. 28, 2014), <http://pic.people.com.cn/n/2014/1128/c1016-26112572.html>.

⁵⁴ Li Jing, *Bo Xilai tells of Wang Lijun’s secret ‘love affair’ with his wife Gu Kailai*, SCMP (Aug. 27, 2013), <http://www.scmp.com/news/china/article/1299645/bo-xilai-tells-wang-lijuns-secret-love-affair-his-wife-gu-kailai>.

⁵⁵ See Michael Wines, *In Rise and Fall of China’s Bo Xilai, an Arc of Ruthlessness*, NY TIMES (May 6), 2012, <http://www.nytimes.com/2012/05/07/world/asia/in-rise-and-fall-of-chinas-bo-xilai-a-ruthless-arc.html>; James Rothwell, *Bo Guagua: The Student Playboy Whose Lavish Lifestyle Could be His Downfall – As Father Bo Xilai Faces Prosecution*, INDEPENDENT (Sept. 10, 2013), <http://www.independent.co.uk/student/news/bo-guagua-the-student-playboy-whose-lavish-lifestyle-could-be-his-downfall-as-father-bo-xilai-faces-8807074.html>

publishing two articles about the mayor taking not only pecuniary but also extraordinary sex bribes (hereinafter the *Yin Donggui Case*).⁵⁶ Yin at the time was being prosecuted for corruption and eventually sentenced to a five-year term in jail. The local court in the privacy suit surprisingly granted Yin both damages and injunctions on the ground that the articles “focused too much” on Yin’s private life as opposed to the ongoing criminal trial.⁵⁷

The application of a property rule in the *Yin Donggui Case* should, however, be considered as largely a one-off anomaly. The outcome was likely attributable to the then prevailing, gender-based conception of sex scandals that rendered inappropriate the public depiction of female-dominated sex. In more recent years, by contrast, the Party disciplinary announcements pertaining to female officials often contain explicit allegations of their sexual affairs,⁵⁸ which shows that the propaganda authorities are definitely not taking a stance similar to that of the Yin Donggui court.

A more recent reported court case, in addition, further suggests that fallen officials nowadays better expect the media property rule to apply to them. In that 2014 case

⁵⁶ Hubei Zaoyang Yuan Shizhang Da Ying Nv Zhang Erjiang Mingyu Quan Guansi (湖北枣阳原市长打赢“女张二江”名誉权官司) [*Former Mayor of Hubei Zaoyang Won Her Reputation Suit Over the “Female Zhang Erjiang” Story*], Xin Jing Bao (新京报) [BEIJING NEWS] (Apr. 30, 2004), <http://www.china.com.cn/chinese/2004/Apr/556025.htm>. The original text of the court decision in this case (hereinafter the *Yin Donggui Case*) is not publicly available.

⁵⁷ *Id.*

⁵⁸ *Supra* note 53; Pandian Luoma Nv Tanguan Choutai Tanlan Bahu Qingfu Chengqun (盘点落马女贪官丑态：贪婪跋扈 情夫成群) [*Scandalous Scenes Made by Corrupt Female Officials: Greed, Abuse, and Hordes of Lovers*], Renmin Wang (人民网) [PEOPLE.COM.CN] (May 7, 2014), <http://politics.people.com.cn/n/2014/0507/c1001-24985747.html> (detailing sex scandals of a female mayor of Zhongshan, Guangdong Province).

decided by a Shanghai court, a former low-level government official, who then served as chair of the board of his homeowner association, sued four fellow homeowners for disseminating pamphlets that described the plaintiff's record of corruption convictions. The plaintiff claimed that defendants violated his privacy in such record because his criminal convictions took place many years ago and legally had no effect on his eligibility to serve on the board, to which the defendants opposed. The Shanghai court ruled against the plaintiff as it found that the criminal record of the plaintiff, being a "public figure" within the residential community, should be made known to his fellow homeowners irrespective of whether applicable electoral rules and regulations require such disclosure.⁵⁹

One must note, however, some further subtleties about the no property rule. On one hand, to the extent that public shaming of a fallen official is initiated from the higher up, there is little room for such individual official to avoid negative publicity through self-help, such as influencing the media outlets' editorial decisions through political or commercial channels. In other words, the media property rule as applied to government officials in some sense could imply compulsory reporting for the media. On the other hand, for fallen officials, all of their private facts are not necessarily an open book for public examination. Instead, and in particular for former high-ranking leaders, curation by the propaganda authorities of the material released can always be expected given the precaution against the risk that uncontrolled shaming potentially backfires to taint the

⁵⁹ Wang Qun yu Zhu Hao, Yu Yang, Zhou Meng, Wang Guanping *Minyu Quan Jiufen An* (王群与朱皓、俞洋、周盟、王关平名誉权纠纷案) [Reputation Dispute Case between Wang Qun and Zhu Hao, Yu Yang, Zhou Meng and Wang Guanping] (2014).

image of the entire regime or to cause unintended collateral expose of the incumbents.⁶⁰

c. Inalienability rules

Notably, China's top political elites may also be subject to an inalienability rule, which is primarily embodied in restrictions imposed on their voluntary publication of certain personal matters. These rules could take the form of both written and unwritten party disciplinary norms, and they are also often created and implemented in a rather *ad hoc* manner based on the Party-state authorities' assessment about the overall sensitivity of the factual matters one is about to disclose.⁶¹

One well-known type of such restrictive norms is a set of review and approval protocol for the publication of autobiographies by high-level government officials.⁶² Other than a few heavily censored biographical treatises, autobiographies and memoirs of China's top leaders, if written at all, can only be purchased in markets outside of the

⁶⁰ See e.g. Ni Xing & Li Zhu (倪星 李珠), *Zhengfu Qinglian Ganzhi: Chaxu Geju ji Qi Jieshi* (政府清廉感知: 差距格局及其解释) [*Perceptions of Clean Governance: the State of Discrepancy and Its Explanation*], *Gonggong Xingzheng Pinglun* (公共行政评论) [JOURNAL OF PUBLIC ADMINISTRATION], no. 3, 2016 at 7-20 (analyzing a set of national survey data collected in 2015 that suggests, among others, that increased publicity of corruption cases could in fact shift the focus of public blame from local governments to the central government). See also Hudson Lockett, *China Anti-Corruption Campaign Backfires*, FT.com (Oct. 10, 2016), <https://www.ft.com/content/02f712b4-8ab8-11e6-8aa5-f79f5696c731> (reporting the previously mentioned study and its implication).

⁶¹ As General Yang Shangkun, a senior revolutionary generation leader who once served as President of the state, noted repeatedly in his officially approved biography, "writing one's memoir is a highly political work." See Yang Shangkun (杨尚昆), *Yang Shangkun Tan Xin Zhongguo Ruogan Lishi Wenti* (杨尚昆谈新中国若干历史问题) [Yang Shangkun on Several Historical Issues in the People's Republic] (2010), Chapter 2.

⁶² Celia Hatton, *What Do Chinese Leaders Do When They Retire?*, BBC News (Mar. 15, 2013), <http://www.bbc.com/news/world-asia-china-21783353>.

mainland China, such as in Hong Kong.⁶³ Not surprisingly, restraining high-level officials from publishing free-wheeling tell-all is integral to the regime's overall effort in maintaining one unified official narrative about the Party-state's past and the present.

Another propaganda policy that has been notably applied in the past decade purports to generally restrict high-ranking officials' pursuit of cultivating a popular media personality. In a recent Communist Party congress plenary's public announcement, it was specifically noted that even favorable propaganda of party leaders shall be prohibited,⁶⁴ for likely the worry that it may weaken the authorities' control over how images of individual leaders are publicly presented. As previously noted, before his spectacular fall, the Chongqing party chief Bo Xilai had launched a high-powered image campaign by occasionally calling media attention to his family life, and that move subsequently was understood as one among other major missteps leading to his downfall.⁶⁵ Meanwhile, as observers have noted, China's propaganda authorities in recent years have sought to keep a lid on media fanning a hype over President Xi Jinping's wife, the nationally famous folk singer Peng Liyuan, despite her

⁶³ The most notable example was the memoir of Zhao Ziyang, a former top-ranked party leader who was sidelined after the Tiananmen Square episode for his sympathy for the protestors and subsequently kept under house arrest till his death, which was published in Hong Kong and widely circulated outside of China as well as informally within the country. *See* ZHAO ZIYANG, PRISONER OF THE STATE: THE SECRET JOURNAL OF PREMIER ZHAO ZIYANG (Adi Ignatius trans. 2010)

⁶⁴ Zhongguo Gongchan Dang Di Shiba Jie Zhongyang Weiyuan Hui Di Liu Ci Quanti Huiyi Gongbao (中国共产党第十八届中央委员会第六次全体会议公报) [PUBLIC PRONOUNCEMENT BY CHINESE COMMUNIST PARTY'S SIX PLENARY OF THE EIGHTEENTH CENTRAL COMMITTEE], Xinhua Wang (新华网) [XINHUANET] (Oct. 27, 2016), http://news.xinhuanet.com/politics/2016-10/27/c_1119801528_2.htm (requiring that propaganda in promotion of Party leaders should be factually grounded and adulation is prohibited).

⁶⁵ *Supra* note 55.

image being widely perceived among the Chinese public as glamorous and highly positive, likely out of a concern that uncontrolled fanning over the first lady could cause her popularity to even overshadow that of her husband.⁶⁶

2. Popular celebrities

By “popular celebrities” here I refer primarily to the men and women who are active and influential in entertainment, sports and other domains of the popular culture. This definition is intended to be broad enough to cover not only singers, actors, athletes, but also other social elites who actively acquire publicity through exposure on televised and/or online news and entertainment programs, such as a notable group of celebrity businesspeople in China who regularly appear on the media in their personal capacities.⁶⁷ As further explained in below Part IV, before the market of commercialized popular culture opened up in the 1980s, actors, singers, athletes and other artists in the People’s Republic resembled more closely, in terms of their legal and political status, to government officials than to “celebrities” as commonly understood in the Western context.⁶⁸ And as previously noted, the introduction of a *Sullivan* style public figure doctrine to Chinese law was directly attributable to a surge in defamation lawsuits against the press filed by individuals of this newly ascended class of social elites throughout the 1990s.⁶⁹

⁶⁶ See e.g. Josh Chin & Yang Jie, *In China, First Lady’s Fashion a Sensitive Topic*, WSJ Blog (Mar. 25, 2013), <https://blogs.wsj.com/chinarealtime/2013/03/25/first-ladys-fashion-a-sensitive-topic-in-china/>.

⁶⁷ Such a broad definition for popular celebrities is most commonly adopted by Chinese scholars. See Wang, *supra* note 30.

⁶⁸ *Infra* text accompanying notes 194-7.

⁶⁹ See Wei & Zhang, *supra* note 26 at 1-2.

a. Media property rule

The American-style public figure defense had gained traction in the discourse of China's legal community since the 1990s.⁷⁰ However, in a series of reported cases during the first decade of the new millennium, the Chinese courts did not rule categorically that celebrities' interest in reputation and privacy must yield to the public's "right to know."⁷¹ These cases, which yielded mixed results, were most often

⁷⁰ Legal journal articles at the time that discusses the *Sullivan*-related issues, *see e.g.* Suli (苏力), *Qiuju Da Guansi An Qiushi Shuyao An he Yanlun Ziyou* (秋菊打官司案、邱氏鼠药案和言论自由) (*The Qiuju Case, the Qiushi Rodenticide Case, and Free Speech*), *Faxue Yanjiu* (法学研究) [Legal Studies], no.3, 1996; Zhang Xinbao (张新宝), *Yanlun Biaoshu he Xinwen Chuban Ziyou yu Yinsi Quan Baohu* (言论表述和新闻出版自由与隐私权保护) [*Freedom of Speech and Press and Protection of Privacy*], *Faxue Yanjiu* (法学研究) [LEGAL STUDIES], no.6, 1996; He Weifang (贺卫方), *Chuanmei yu Sifa Santi* (传媒与司法三题) [Three Topics on Media and Court], *Faxue Yanjiu* (法学研究) [LEGAL STUDIES], no.6, 1998.

⁷¹ In the Western legal context the "right to know" concerns primarily citizens' right to demand information from government so as to ensure accountability of the latter. In the Chinese context, however, in both legal and popular discourse in China the "right to know" concept has quite often been spoken about in much more loose terms as concerning virtually almost all types of newsworthy information. For example, till this day it is still very common to read in media commentaries that commentators would deliberate on a "right to know" by the public into celebrities' sexual life. *See e.g.* Bai Baihe Na Erzi Dang Dangjian Pai Mingxing Yinsi Quan yu Dazhong Zhiqing Quan zhi Zheng (白百合拿儿子当挡箭牌? 明星隐私权与大众知情权之争) [*Is Bai Baihe Using Her Son as Her Shield? Debates Over Celebrity Privacy and the Public's Right to Know*], *Baidu Zhidao Ribao* (百度知道日报) [BAIJIAHAO.COM] (Apr. 19, 2017), <http://baijiahao.baidu.com/s?id=1565055184075008&wfr=spider&for=pc> (considering the concept of right to know in the case of actress Bai Baihe whose extramarital affair was exposed). Moreover, in celebrity privacy litigations, it is also common to see judges invoke the term "right to know" in their decisions. *See e.g. The Baijing Case* (court noting that the tragic event taking place between actress Bai Jing and her husband is newsworthy and thus "falls into the scope of the public's right to know"); *The Inou Case* (court noting that a balance must be struck between celebrity's privacy interest and the public's right to know). That said, with a FOIA regime modeling that of the United States being put in place since 2008, the legal discourse on the "right to know" has indeed become increasingly focused on the disclosure of information about government bodies and officials. *See Zhonghua Renmin Gonghe Guo Zhengfu Xinxi Gongkai Tiaoli* (中华人民共和国政府信息公开条例) [PRC REGULATION ON OPEN GOVERNMENT INFORMATION] (2008); Wang Xixin

litigated as defamation suits. But as one read the decisions, the courts' reasoning often turn not only on the factual accuracy of the disputed media stories, but also upon their view about whether the disputed news storied encroached too much into the celebrity figures' life off stage. For example, in a high-profile case in 2006, pop singer Zhang Liangying lost her suit against a newspaper for a story about her being excessively bossy or even abusive towards service staff at a hotel.⁷² The court reasoned that Zhang must tolerate such report, factually accurate or not, as the media was simply doing its job to keep the curious public informed.⁷³ Yet when more personal matters were at stake, the same court in Shanghai would take a more cautious stance. In the 2004 case filed by Hong Kong director Stanley Tong, the Shanghai court rejected the public figure defense and ordered six media defendants to pay monetary damages to Tong for an allegedly inaccurate story about Tong's romantic relationship with a Malaysian actress who, as the report suggested, may have suffered miscarriage during the affair.⁷⁴

(王锡铎), *Lanyong Zhiqing Quan de Luoji ji Zhankai* (滥用知情权的逻辑及展开) [Logics and Extensions of the Abuse of the Right to Know], *Faxue Yanjiu* (法学研究) [LEGAL STUDIES] (discussing legal issues relating to the right to know in the context of China's FOIA regime). *But see* LAWRENCE M. FRIEDMAN, *GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY* 230 (2007) (discussing "right to know" in a more loose, ideological sense, as concerning the public's interest in prying into celebrity life).

⁷² Zhang Liangying Su Wenhui Xinmin Lianhe Baoye Jituan Mingyu Quan Jiufen An (张靓颖诉文汇新民联合报业集团名誉权纠纷案) [*Case of Reputation Right Disputes Filed by Zhang Liangying Against Wenhui Xinmin United Press Group*] (2006) (hereinafter the *Zhang Liangying Case*).

⁷³ *Id.*

⁷⁴ Tang Jili Su Neidi 6 Meiti Qinfan Mingyu Quan Huopei 15 Wan (唐季礼诉内地 6 媒体侵犯名誉权 获赔 15 万) [Stanley Tong Sued Six Mainland Media for Infringing Upon His Reputation Right and Won Damages of RMB150,000], Wangyi Xinwen (网易新闻) [NETEASE] (May 19, 2006), <http://news.163.com/06/0519/08/2HFMHJAG00011229.html>.

Although the media property rule does not seem to have been consistently applied by the Chinese courts to popular celebrities in the 2000's, it has subsequently taken a stronger hold in the court of both law and public opinion in the 2010's. One development that may reveal such growing societal receptiveness of the media property rule for popular celebrities is the ascent of China's home-grown paparazzi. While in the early 2000's the Chinese paparazzi had already started to spin their operations off from mainstream news organizations, it is during the 2010's that they, being both emboldened and enabled by the significant expansion of Internet social media, have sought to accumulate a massive base of followers of their work and to bring their niche trade from previously behind the scene to the front stage of China's public discourse.⁷⁵ And despite Chinese celebrities' repeated open threats to sue media and paparazzi, actual legal actions have become increasingly rare, and that is true in particular in cases where the unwanted publicity concerns celebrity behaviors that may implicate the transgression of moral norms. For example, in recent two decades, a number of celebrities had been tipped over to the police authorities and the press who, sometimes even arriving on the spot together, would catch the individuals for using recreational drugs at private parties or even at home.⁷⁶ The media stories reporting on such

⁷⁵ Yema Caijing (野马财经) [Wild Horse Finance], Zhongguo Diyi Gouzai Zhuo Wei he Ta de Fengxing Yuanlai Bing Meiyou Xiangxiang zhong Name Zhuanqian (“中国第一狗仔”卓伟和他的风行，原来并没有想象中那么赚钱) [*China's No.1 Paparazzo and His Studio Turned Out Not to Be So Lucrative As People Tend to Imagine*], Tai Meiti (钛媒体) [TMTPOST] (Oct. 31, 2016), <http://www.tmtpost.com/2516759.html> (reporting that Zhuo Wei and his partner left their media job in 2002 to go freelance and in 2010's started to ride the tide of social media to shift into a new model for creating, disseminating and monetizing paparazzi material).

⁷⁶ Matt Sheehan, *China's Drug Crackdown Targets Celebs And Foreigners*, HUFF PO.

incidents often include highly embarrassing textual and graphic depictions. No celebrities have been even known to file suits over such coverage, for not only its lack of crisis PR senses but likely also a generally accepted notion that they do not stand a good chance to win such cases.

Another major type of private life matter against whose unwanted disclosure Chinese celebrities have not been able to seek legal protection concerns extramarital affairs. Although on the surface the mainstream moral norm in mainland China has remained relatively conservative, the actual social practice on the ground is no longer as prudish,⁷⁷ and as a matter of law adultery is neither a criminal offense nor even a civil wrongdoing.⁷⁸ In fact, the Chinese courts have ruled on multiple occasions that non-celebrity adulterers should have their privacy interest respected by even their

(Dec.6, 2014), https://www.huffingtonpost.com/2014/08/28/china-drug-crackdown_n_5722880.html.

⁷⁷ See e.g. Na Zhang, William L. Parish, Yingying Huang & Suiming Pan, *Sexual Infidelity in China: Prevalence and Gender-Specific Correlates*, 41 ARCH SEX BEHAV. 861 (2012) (finding through survey data that despite overwhelming attitudinal disapproval against extra-marital sex Chinese male and female prevalence of infidelity match or exceed the median for other countries).

⁷⁸ Bigamy is, however, but the offense of bigamy requires not just extramarital sex but also cohabitation as legal or de facto married couple. Zhonghua Renmin Gonghe Guo Xingfa (中华人民共和国刑法) [PRC CRIMINAL LAW]§258 (offense of bigamy subject to up to two years in jail). Prosecution of this offense is extremely rare. Meanwhile, a comparative point relevant here is the Taiwan province, whose law till this day continues to criminalize adultery and actual prosecutions, which are initiated by the wronged spouse, take place on a rather regular basis.

spouses,⁷⁹ let alone third parties.⁸⁰ Nonetheless, when popular celebrities in China became exposed for engaging in extramarital affairs, often by aggressive and intrusive paparazzo operations,⁸¹ very rarely have these individuals chosen to dispute such intrusion in courts despite the humiliating coverages that often cost them lucrative performance stints and commercial deals.⁸² Instead, it is reported that most celebrities would seek to strike deals with the paparazzi,⁸³ purchase reputation management

⁷⁹ In 2003, a Sichuan court already ruled against a wife for privacy violation as she and the private investigator she hired happened to shoot footages of her husband and his other family members in showers. See Li Ping Su Qizi Chen Rongping Lihun Qijian Toupai Zhuojian Qinfan Hunnei Yinsi Quan An (李平诉妻子陈荣平离婚期间偷拍捉奸侵犯婚内隐私权案) [*Case Filed by Liping Against Wife Chen Rongping Over Invasion into Marital Privacy by Taking Photos of Adulterous Scenes During Divorce Proceedings*] (2003).

⁸⁰ Wang Fei Su Zhang Leyi Mingyu Quan Jiufen An (王菲诉张乐奕名誉权纠纷案) [*Case on Reputation Right Dispute Between Wang Fei and Zhang Leyi*] (2009) (hereinafter the **Wang Fei Case**, the fact of which see *infra* text accompanying notes 126-8).

⁸¹ Wang Xiaofei (王小峰), Zhongguo Shi Gouzai Dui Shengzhang Ji Toukui de Dixian (中国式狗仔队生长记:偷窥的底线) [*Growth of Chinese Paparazzi: The Bottomline for Prying*], Sanlian Shenghuo Zhoukan (三联生活周刊) [*Sanlian Weekly*] (Nov. 7, 2013), http://www.lifeweek.com.cn/2013/1111/43148_2.shtml.

⁸² Shendu Zhuizong Chouwen Mingxing Shifa Hou Jingkuang Bacheng Yiren Zao Jingji Gongsi Xuecang Fuchu Hou Shenjia Die Yiban (深度追踪丑闻明星事发后境况:八成艺人遭经纪公司雪藏 复出后身价跌一半) [*In-depth Investigation of How Celebrities Fare in the Wake of Scandals: Eighty Percent Were Put on Hold by Their Agencies and Engagement Fee Rates Fall by Half When They Return*], Tengxun Yule (腾讯娱乐) [Tencent Entertainment] (Sept. 12, 2014), <http://ent.qq.com/original/guiquan/g138.html>.

⁸³ Tiqin Meiyou Xian (提琴没有弦), Zhongguo Diyi Gouzai Zhuo Wei Kao Shou Mingxing Gongguan Fei Zhuanqian? Ta Benren Zheme Shuo (“中国第一狗仔”卓伟靠收明星公关费赚钱? 他本人这么说) [*Does China’s No.1 Paparazzo Zhuo Wei Profit by Soliciting Hush Payment from Celebrities? Listen to What He Has to Say*], Hu Xiu (虎嗅) [HUXIU.COM] (Apr. 13, 2017), <https://www.huxiu.com/article/190253.html> (citing another paparazzo who said that Zhuo’s business practices have long included solicitation of hush money from celebrities).

services such as post deletion and search engine optimization,⁸⁴ lay low and wait out,⁸⁵ or, for the more desperate, confront the paparazzi with physical violence.⁸⁶

In a few notable court cases where celebrity figures did choose to sue paparazzi for publicizing facts that implicating their moral and legal transgressions, the courts' decisions have generally affirmed the media property rule approach. One example is a 2016 case decided by a Beijing court against the rock singer Wang Feng, who sued a leading paparazzo, Zhuo Wei, for blogging about Wang's gambling trips in multiple casinos outside of China.⁸⁷ Gambling is illegal within mainland China, but gambling outside of mainland China does not typically cause a Chinese citizen any legal trouble within the country. Nonetheless, given that the behavior is interpreted as a sign of irresponsible personality, Zhuo's blog post enraged Wang enough for the latter to sue

⁸⁴ Weyu Jiazhi Guan (文娱价值观), Weibo Resou he Yitiao Mai Chulai de Chanye Lian (微博热搜和一条“买”出来的产业链) [*Weibo Hot Search and An Industry Built on User Purchases*], Pintu (品途) [Pintu] (Jan. 14, 2018), <https://www.pintu360.com/a43642.html> (noting that celebrities facing scandals sometimes may purchase top display spot on Weibo's hot search page to direct user attention to other news than their own scandal).

⁸⁵ Kankan Chen He Bai Baihe Wei Shenme Buneng Fuchu? (看看陈赫，白百何为 什么不能复出?) [*Why Chen He and Bai Baihe Cannot Return to the Limelight*], Tengxun Yule (腾讯娱乐) [TENCENT ENTERTAINMENT] (Dec. 1, 2017), <http://ent.qq.com/a/20171201/020998.htm>.

⁸⁶ Chen Yufan Zalan Gouzai Chechuang Lvmao Daicheng Zheyang le Haiyao Zenyang (陈羽凡砸烂狗仔车窗：绿帽戴成这样了 还要怎样) [*Chen Yufan Broke Windshield of Paparazzo's Car: What Do You Want from a Man with a Cheating Wife*], Zhongguo Wang (中国网) [China.com] (May 10, 2017), <http://news.china.com/socialgd/10000169/20170510/30508989.html> (reporting the incident of singer Chen Yufan engaging in physical violence with paparazzi who followed him after his wife, actress Bai Baihe, was exposed for engaging in extramarital relationships).

⁸⁷ Wang Feng yu Han Bingjiang Mingyu Quan Jiufen Shangsu An (汪峰与韩炳江名誉权纠纷上诉案) [*Appellate Case of Reputation Dispute between Wangfeng and Han Bingjiang*] (2016) (hereinafter the *Wang Feng Case*).

likely because at the time Wang was in the midst of an ugly PR battle with an ex-wife over child custody. In turning down Wang's case, the court pointed out that Zhuo's depiction of Wang as an avid gambler was factually accurate.⁸⁸ Whether or not Wang's reputation could have been harmed, as the court reasoned, must therefore be attributable mostly to his own questionable behaviors, which the public has the right to know, not to the superlatives in Zhuo's writings.⁸⁹

Another illuminative case in which a Chinese court effectively affirmed the no property rule for popular celebrities is the 2014 case of Bai Jing. The parents of the deceased Bai Jing, a former B-list young actress, sued a Weibo (China's Twitter) personality after the latter publicized a post about how Bai, who was stabbed to death by her businessman husband (who committed suicide after the killing), had conspired with a lover to criminally defraud her husband and also perhaps inadvertently caused the death of her mother-in-law.⁹⁰ The court expressly balanced Bai and her family's privacy interest against the newsworthiness of the incident, and decided that since Bai was "a young actress of certain notoriety," her death and the causes to a series of tragic events are highly newsworthy, and the public's right to know should thus trump Bai and her family's privacy interest.⁹¹ Most likely, that highly pro-speech decision is attributable to not only the case's dramatic fact pattern but also the implication of

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Gao Moumou Deng yu Ju Moumou Mingyu Quan Jiufen An (高某某等与巨某某名誉权纠纷案) [*Case of Reputation Disputes between Gao and Ju*] (2014) (hereinafter the ***Bai Jing Case***).

⁹¹ *Id.*

morally questionable and even criminal behaviors of both Ms. Bai and her lover.

b. Liability rule

Since the late 1980's, the Chinese courts have overall applied a liability rule in right of publicity suits involving the unauthorized commercial use of the celebrities' images and persona.⁹² While in those cases the courts technically award both monetary damages and injunctions against further use, the effective regime is still closer to one based on the liability rule given that the injunctions are often inadequately enforced and the damages are too small in size. The NBA star player Yao Ming, for example, sued in 2011 in a Hubei court against a sports outfit company for unauthorized use of his image in advertisements. While Yao Ming won the case, his original damage claim in the amount of RMB 10 million (more than 1.5 million in US dollars) was cut down by the court to merely RMB 300,000 (less than 50,000 in US dollars), which must surely be dwarfed by what Yao pockets from his average licensing deal given his notoriety in China.⁹³

⁹² One notable exception is the case concerning Pu Yi, the last emperor of the Qing dynasty, the last imperial dynasty in China's history. From 1999 to 2005 a public exhibition of pictures taken during Pu Yi's life had been put on in the forbidden city museum in Beijing. In 2006 a younger brother of the late Pu Yi filed a suit against the organizer of such exhibition for unauthorized use of Pu Yi's portrait for commercial purposes. The Beijing court ruled against the plaintiff on the ground that the exhibition was highly educational for the public and did not infringe upon the right of Pu Yi who was a nationally recognized public figure. Liu Yumin & Chang Liang (刘玉民, 常亮), *Zhongguo Zuihou de Diwang Shijia Zhan Qinquan An Xuanpan* ("中国最后的帝王世家展"侵权案宣判) [*Decision Made for the Tort Case about "Exhibition of China's Last Imperial Family"*], Beijing Fayuan Wang (北京法院网) [BEIJING COURTS] (Jul. 14, 2006), <http://bjgy.chinacourt.org/article/detail/2006/07/id/842876.shtml>.

⁹³ Yao Ming yu Wuhan Yunhe Da Shayu Tiyu Yongpin Youxian Gongsi Qinfan Renge Quan ji Bu Zhengdang Jingzheng Jiufen (姚明与武汉云鹤大鲨鱼体育用品有

In reputation and privacy disputes, meanwhile, the application of a liability rule approach can also be found, in particular in such 2000s cases as the previously mentioned decision for *Stanley Tong*, where the Hong Kong film director was awarded a damage in the modest amount of RMB 300,000 in total from six large media outlets. In the 2010s, the application of a liability rule in popular celebrity privacy cases appears more clearly to be the minority approach for Chinese courts, although such decisions reflect the courts could become concerned about the harshness of the media property rule in at least those cases where popular celebrities are not implicated for unequivocal norm transgressions.

The notable recent example of such minority cases is one in 2014 decided by a Tianjin court in favor of Annie Shizuka Inou (*aka* Yi Neng Jing), a Taiwanese singer and actress, against the publisher of a local tabloid. The dispute was over a gossip piece ran by the tabloid that, based on paparazzo materials, suggested that Inou was romantically involved with an actor and would marry him soon.⁹⁴ At the time of the story, both Inou and the said actor had recently divorced from their respective celebrity

限公司侵犯人格权及不正当竞争纠纷) [*Disputes Over Personality Right Infringement and Unfair Competition between Yao Ming and Wuhan Yuhe Da Shayu Sports Product Co., Ltd.*] (2011). There's no officially disclosed figure of Yao's licensing fees in his commercial deals, although the speculation is that his licensing revenues could gross more than 1 billion in those years between 2011 and 2013. See Yao Ming Liangge Zi shi Ju E Wuxing Zichan? Yao Ming Daodi You Duoshao Qian (“姚明”两个字是巨额无形资产？姚明到底有多少钱) [*Are the Two Characters of “Yao Ming” Tremendous Intangible Assets? How Much is Yao Worth*], Souhu Tiyu (搜狐体育) [SOHU.COM] (Feb. 10, 2017), http://www.sohu.com/a/125978340_523828.

⁹⁴ Tianjin Shi Baokan Chuban Youxian Gongsi yu Wu Moumou Mingyu Quan Jiufen An (天津市报刊出版有限公司与吴某某名誉权纠纷案) [Case of Reputation Right Dispute Between Tianjin Press Co. Ltd. and Wu] (2014) (hereinafter the *Inou Case*).

marriages. Inou complained to the court that while she was not actually involved with the said actor, her son suffered embarrassment at school as his classmates inquired about his mother's new relationship.⁹⁵

The Tianjin court, ruling for Inou's requests for damages as well as for injunctive orders for the publisher to apologize and cease further publications, rejected the publisher's public figure defense. The court reasoned that, besides that the story was factually inaccurate, Inou's romantic relationship concerns no public interest, and the public's insatiable curiosity into such matters, while undeniably real, does not legitimize the tabloid's exploitation of privacy for profit.⁹⁶ The Tianjin court's explicitly anti-paparazzi decision may have something to do with its sympathy for Inou who overall had tried hard, albeit not all successfully, to curate a positive public image and in this particular case did not seem to engage in morally wrongful behaviors. But the decision was written in such strong and broad term that it virtually said that the gossip tabloid and paparazzi business should not have even existed in China.⁹⁷

Nonetheless, the decision of the *Inou Case* could not have not shut down the trade of tabloid and paparazzi in China. The damage of RMB 40,000 (about USD 6,500), as Inou was awarded, is of a typical size from Chinese courts that unlikely would create a strong deterrent for publishers. The injunctive relief against further publication would also mean little since at the time of the suit's conclusion most copies of the tabloid have

⁹⁵ *Id.*

⁹⁶ There were obviously different accounts about whether Inou and the said actor were indeed seeing each other at the time, although subsequently Inou went on to marry another mainland actor.

⁹⁷ *Supra* note 94.

already been sold. Even if the liability rule illustrated by the *Inou Case* could become applied in more cases in the future, it seems at most to imply a higher operating cost for China's tabloid industry in the aggregate terms provided that they choose to muckrake on incidents beyond serious celebrity misbehaviors.

c. Inalienability rule

In recent years, China's censorship regime has also from time to time adopted an inalienability rule approach on celebrity privacy. In June 2017, for example, China's cyberspace authorities abruptly forced the shutdown of over 60 celebrity gossip social media accounts,⁹⁸ including the highly influential and popular Weibo account of the previously mentioned "Number One Paparazzo" Zhuo Wei who had, at the time of the shutdown, garnered a follower base of seven million.⁹⁹ The official rationale for such shutdown, as typically articulated, is that the poor taste cultivated by the rampant paparazzi materials not only violates the celebrities' right to privacy but also corrupts the general social mores.¹⁰⁰ But as Zhuo Wei and other paparazzi re-emerged in public sight towards the year end of 2017 and bombed the social media again with several new

⁹⁸ *China Closes 60 Celebrity Gossip Social Media Accounts*, Reuters (Jun. 8, 2017), <https://www.reuters.com/article/us-china-internet-censorship/china-closes-60-celebrity-gossip-social-media-accounts-idUSKBN18Z0J3>.

⁹⁹ *Id.*

¹⁰⁰ As such shutdown was effected through the social media platforms, one of the major affected platforms, Weibo, made a public announcement that reveals the official line underlying this wave of censorship operation. See Weibo Guanbi Yipi Chaozuo Disu Zhuixing Zhanghao She Zhuo Wei Quan Mingxing Tan (微博关闭一批炒作低俗追星账号 涉卓伟、全明星探) [*Weibo Shuts Down A Series of Vulgar Celebrity Gossip Accounts Including Zhuo Wei and Quan Ming Xing Tan*], Guancha (观察) [GUANCHA.COM] (Jun. 7, 2017), http://www.guancha.cn/Celebrity/2017_06_07_412132.shtml (reporting the incident and citing the Weibo public announcement).

rounds of celebrity gossip stories, it became clear that the actual propaganda agenda underlying the temporary silencing of the paparazzi was primarily to minimize media distraction from the critical Party congress that took place in October of that very year.¹⁰¹

Such temporary paparazzi ban is characterized here as an inalienability rule, rather than a property rule, because the authorities in implementing such ban aim to prevent all, as opposed to only unauthorized, coverage of celebrity gossips that are deemed as public vice and nuisance. Indeed, as previously described, the Chinese court for the *Inou Case* in formulating the liability rule expressed already a similar attitude against commercialized gossips. Through the inalienability rule, meanwhile, the propaganda authorities are more overtly intervening in the celebrity economy by putting on hold a common and important marketing model, through which many celebrities have in fact been deliberately drawing publicities through sensationalizing the salacious and controversial aspects of their own personal life.¹⁰²

¹⁰¹ Other speculative theories were proposed at the time too. As some have perceptively uncovered, the paparazzi ban, as implemented by platforms, was not complete and likely under-inclusive. Widely sensationalized celebrity gossips continue to pop up almost immediately after the salient operation of takedown. As for Weibo, several well-known paparazzi accounts were found to have survived the shutdown operations, triggering speculation that Weibo was only purging those accounts that refused to enter into profit-sharing arrangements with the platform. See Bao Yu (暴娱), Zhuo Wei deng Bagua Lei Zhanghao Zao Quan Pingtai Fengsha Beihou you Chuan Yinmou (卓伟等八卦类账号遭全平台封杀, 背后又传“阴谋”) [*Zhuo Wei and Other Gossip Accounts Shut Down Across the Platform Causing Conspiracy Theories to Rise*], Souhu (搜狐) [Sohu.com] (Jun. 8, 2017), http://www.sohu.com/a/147081608_522849?loc=2&cate_id=1406.

¹⁰² See e.g. Yichuang Qingshu (一床情书), Baba Yule Quan 10 Dui Xuanchuan Qi de Mingxing Qinglv (扒扒娱乐圈 10 对宣传期的明星情侣) [*Exposing Celebrity Couples Who Were Only Together During the Promotion Period for New Shows*], Souhu (搜狐) [Sohu.com] (Apr. 19, 2016), http://www.sohu.com/a/70126566_156895

3. Cultural dignitaries

While popular celebrities are most visible in China's contemporary celebrity economy, one unique group of public figures that remain influential in the twenty-first century but have been notably exempt from the media property rule is one that may be called, for lack of a better shorthand, "cultural dignitaries." This group in China primarily consists of well-known and highly regarded academics, literary authors, and artistic elites in the realm of high, as opposed to popular, culture. Often but not necessarily, these cultural dignitaries may also have either held official government positions or otherwise formally honored by government authorities for achievements in their own areas. Their status as distinct from the rest of the society's famous and influential, in this vein, has much to do with their cultural and political capital, and a property rule as applicable for their privacy entitlements both reflects and reinforces their reputational advantages.

The court case that best illustrates the robustness of the property rule protection for cultural dignitaries is the *Yang Jikang Case* described in Part I, in which case the court ruled to enjoin on an auction of letters between the Qian/Yang family and a family friend of theirs.¹⁰³ One relevant background there is that historically, hand-written letters of famous Chinese literary elites were long understood as semi-public and collectible artworks.¹⁰⁴ Academics and journalists who had the chance to view the

(going through examples of actors allegedly faking romantic courtships in order to promote their new shows).

¹⁰³ The *Yang Jikang Case*, *supra* note 8.

¹⁰⁴ See David Pattinson, *Privacy and Letter Writing in Han and Six Dynasties China*, in *CHINESE CONCEPTS OF PRIVACY* (Bonnie S. McDougall & Anders Hansson eds.,

Qian/Yang family letters in that case also agreed that their contents are not of particularly sensitive nature.¹⁰⁵ In court, the auction agency argued that at least a number of the letters were already publicized in one way or another prior to the relevant display it arranged for the auction. But the courts did not seem to find any of those background matters relevant at all.¹⁰⁶ While they noted the potential public interest in the academic and aesthetic value of the Qian family letters, they did not have any difficulty finding Yang's privacy interest in the letters as more compelling.¹⁰⁷ Such a stance, even more intriguingly, has also been shared by many legal scholars who opined publicly on this dispute at the time.¹⁰⁸

In the U.S. and European jurisdictions, the copyright law has also been relied upon quite often as a shield for privacy in unpublished personal letters.¹⁰⁹ Yet in the *Yang*

2002) at 97-118.

¹⁰⁵ Qian and Yang in those letters made some innocuous, mildly satirical or critical comments on some other literary dignitaries of their generation, which likely can be considered somewhat "sensitive" only for those within this high culture circle. The friend who was the defendant in the case also claimed that he had burned those letters that contained more sensitive and private contents before he made the transfer. Fayuan Jiaoting Qian Zhongshu Shuxin Paimai Mingren Xinzha shifou Yinsi Nan Dinglun (法院叫停钱钟书书信拍卖 名人信札是否隐私难定论) [The Court Halted Auction of Qian's Letters, Not Entirely Settled If Letters of Famous People Constitute Privacy], Renmin Wang (人民网) [People.cn] (Jun. 5, 2013), <http://culture.people.com.cn/n/2013/0605/c22219-21739745.html>.

¹⁰⁶ See *supra* note 8.

¹⁰⁷ The trial court simply stated in passing that correspondence secrecy should not be violated or otherwise people may no longer have incentives to continue to write letters, which is detrimental to "social public interest and the 'development of culture'." See *id.*

¹⁰⁸ Zhao Enuo (赵婀娜), Qian Zhongshu Shuxin Jiang Bei Paimai (钱锺书书信将被拍卖 杨绛质问:个人隐私岂容买卖) [*Qian Zhongshu's Letters Are To Be Auctioned and Yang Jiang Questioned How Could Personal Privacy Be Traded*], Renmin Ribao (人民日报) [PEOPLE'S DAILY] (May 27, 2013), <http://culture.people.com.cn/n/2013/0527/c22219-21621804.html>.

¹⁰⁹ Benjamin Ely Marks, *Copyright Protection, Privacy Rights, and the Fair Use Doctrine: The Post-Salinger Decade Reconsidered*, 72 N.Y.U. L. REV. 1376, 1400-

Jikang Case, the Chinese court unequivocally decided the case on the privacy ground as separate from the copyright ground: The family friend of Qian/Yang, who was not liable for the copyright infringement since he did not arrange for the auction-related displays, was found by the court in violation of privacy for “selling or otherwise transferring the letters” without ensuring that the letters remain kept in confidence.¹¹⁰ In comparative terms, such a rule would amount to the U.S. courts holding Joyce Maynard, a former lover of J.D. Salinger, liable for selling Salinger’s love letters to her if she failed to prevent subsequent publicities, which could have been a stretch for the U.S. law.¹¹¹ Instead, the *Yang Jikang Case* resembles more closely the protective stance taken by the English Lord Chancellor in the mid-nineteenth century as he prohibited the exhibition of the royalty’s etchings based on the English theory of breach of

1401 (describing relevant statutory provisions in French, German and Italian copyright laws). The Warrant & Brandeis invention of privacy indeed derived from copyright. See Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE WESTERN RESERVE L. REV. 647 (1991).

¹¹⁰ The court also noted that Yang in one letter mentioned to the friend her concern that after Qian’s death many of his letters and manuscripts have been disseminated on the collectibles market, and she asked the friend to “take good care of the letters.” It would be a stretch, however, to say that such a reminder constitutes a contract between Yang and the friend that gave rise to a contractual obligation on the latter, and the court did not take such a step either. However, the scope and nature of this duty of confidentiality on letter recipients is far from clear based on the court’s discussion. One could rightly suspect the sweeping statement is only made in such a case as involving the particular parties. See *supra* note 8.

¹¹¹ See Peter Applebome, *Love Letters in the Wind: Salinger's for Auction*, NY TIMES (May 12, 1999), <https://archive.nytimes.com/www.nytimes.com/library/books/051299salinger-letters.html>. In 1987, before the Joyce Maynard saga, Salinger prevailed in court with his copyright claims against a British biographer, Ian Hamilton, who was found to have exceeded the boundary of fair use by paraphrasing in his work Salinger’s unpublished letters to others. See *Salinger v. Random House, Inc.*, 811 F.2d 90 (2nd Cir. 1987).

confidentiality.¹¹²

As previously noted, the *Yang Mo Case* of 1987 should suggest that the property rule approach for cultural dignitaries may trace well back to the early days of modern privacy law in China. In addition to being a senior government official, Yang Mo was also among the rank of the old generation of literary dignitaries in the People's Republic. And as we look outside of the courtroom, the property rule for cultural dignitaries may also find notable support from social attitudes. In a contemporary example, Professor Yang Zhenning, a Chinese American physicist and Nobel laureate, in 2004 married in China at the age of 82 his assistant who was 28 years old, arousing understandable public curiosity across the Chinese society.¹¹³ The couple in subsequent years have been subjected to media attention for both their public appearances and personal lives. As legal scholars write about media coverage of this couple as example in privacy discussions, many argue that the personal life of Yang Zhenning, a respectable intellectual with achievements of highest order, should not be disturbed by the media's prying inquiries,¹¹⁴ despite their marriage being obviously topical and that the couple

¹¹² Post, *supra* note 109 at 656.

¹¹³ Yang Zhenning yu Weng Fan Jiehun 10 Nian Cheng Wo Qushi Ni Ke Zaihun (杨振宁与翁帆结婚 10 年 称我去世你可再婚) [*Yang Zhenning and Weng Fan Married for Ten Years and Yang Said Weng May Re-marry Once He Dies*], Xinlang Yule (新浪娱乐) [Sina Entertainment] (Oct. 10, 2014), <http://ent.sina.com.cn/s/m/2014-10-10/07254221611.shtml>.

¹¹⁴ See Li & Zheng, *supra* note 44 at 99. Zhu Sibe (朱四倍), Zunzhong Geren Xuanze Zhufu Nuobeier Jiang Dezhu Yang Zhenning (尊重个人选择 祝福诺贝尔奖得主杨振宁) [*Let Us Respect Personal Choice and Wish the Nobel Laureate Yang Zhenning the Best*], Tengxun Xinwen (腾讯新闻) [TENCENT NEWS] (Dec. 18, 2004), <https://news.qq.com/a/20041218/000039.htm>.

actually has done their own part of revealing private details to the media.¹¹⁵

Yang Jikang, Yang Mo, and Yang Zhenning, aside of their identical surname, share a common characteristic, which is that they were already in their old ages and their names were made primarily in an era before the commercialized media played a substantial role in the social process of reputation production. As the size of such older generation of elites presumably dwindles over time, one plausible prediction is that the entire category may eventually vanish. Nonetheless, the alternative possibility is that the group of cultural dignitaries may actually become periodically replenished, as a small number of the younger generation of artists and intellectuals may become promoted to an exalted status as compared with their former peers.

One example of such elevated figure is the film director Zhang Yimou who in the most recent decade is best known for, among others, directing the opening ceremony of the Beijing Olympics of 2008. Zhang started his directing career in the early days of China's commercial film sector in the 1980s and gained recognition initially for his work on several artistically acclaimed movies, but through late 1990s and 2000s, he worked on several popcorn blockbusters and comedies that received only mixed critical reviews.¹¹⁶ However, after his extraordinarily successful stint at the Beijing Olympics, Zhang ascended, being heavily decorated with social accolades and government awards, to a status that was then much closer to that of Yang Mo and Yang Jikang.¹¹⁷ Such

¹¹⁵ See e.g. *supra* note 113

¹¹⁶ See Zhang Yimou's Wikipedia page, https://en.wikipedia.org/wiki/Zhang_Yimou.

¹¹⁷ See e.g. Zhongguo Dianying de Qizhi Zhang Yimou (中国电影的旗帜——张艺谋) [Standard Bearer of Chinese Films Zhang Yimou], Renmin Wang (人民网) [PEOPLE.COM.CN], <http://culture.people.com.cn/GB/42223/164158/>.

status may have helped him in the privacy court. In a 2010 lawsuit filed by Zhang against a major nationwide publisher, Huaxia Press, over a biography that depicted his romantic relationships, which in fact had long been a tabloid favorite, the court unequivocally ruled that Zhang, even an unmistakable public figure, should be allowed the control over whether and how his personal life is disclosed and presented to the public.¹¹⁸ Such control as premised on the property rule obviously sets Zhang apart from his fellow movie directors of the same generation, lest movie stars and singers, who as previously described are most accustomed to the media property rule.¹¹⁹

4. Other “voluntary” public figures

a. Media property rule

The concept of “voluntary public figure” was formally invoked by Chinese courts first and only in 2008 in the earlier mentioned landmark *Yang Lijuan Case*, the ultra-

¹¹⁸ Zhang Yimou Su Huaxia Chuban She Huang Xiaoyang Mingyu Qinquan An (张艺谋诉华夏出版社、黄晓阳名誉侵权案) [*Case Filed by Zhang Yimou Against Huaxia Press and Huang Xiaoyang Over Reputation Infringement*] (2010) (hereinafter the **Zhang Yimou Case**).

¹¹⁹ That said, it is also notable that consistent with the earlier discussion about entertainment celebrities in general, Zhang was not completely spared from the negative media coverage that implicates him for legal violations. In 2013, a microblogger exposed Zhang for secretly violating the family planning restrictions, posting pictures of him being with his wife and three children that were born at a time before the law revised the one child policy. While Zhang complained about the paparazzo techniques used for following his family and taking photos, he did not file any legal claim this time but offered to collaborate with local government authorities with respect to the relevant fines he was supposed to pay up for the past violations.

See Zhang Yimou Chaosheng Shijian (张艺谋超生事件) [Incident of Zhang Yimou’s Violation of Family Planning Rules], Baidu Baike (百度百科) [BAIDU ENCYCLOPEDIA], <https://baike.baidu.com/item/%E5%BC%A0%E8%89%BA%E8%B0%8B%E8%B6%85%E7%94%9F%E4%BA%8B%E4%BB%B6?fr=aladdin%EF%BC%89> (summarizing descriptions about the incident using multiple media sources).

zealous fan from an inland rural backcountry whose father committed suicide after Ms. Yang's fanciful marriage proposal to a Hong Kong pop star was turned down. Many commenters view that case as representing the lowest watermark for the legal protection of privacy entitlements in China. The public curiosity at the time in finding out the back stories of Ms. Yang's erratic behavior was surely more than obvious. But what's remarkable is that in neither trial nor appellate decisions could one find even a slight of sympathy from the court for the Yang family who, by virtue of that piece of news story, had its long history of dysfunctions exposed in such detail as that Yang's father used to physically brawl with his brother over the romantic relationship with Yang's mother, that the father may have even killed his own mother, and that Yang's mother engaged in serial adulterous relationships.¹²⁰

As prior discussion has demonstrated, not even all "genuinely voluntary" public figures have been subjected to a media property that is applied in such absolute fashion as in the *Yang Lijuan* case. The case has subsequently drawn critiques from legal and media scholars,¹²¹ and the Chinese courts have since also quietly avoided invoking expressly the concept of "voluntary public figures" again.¹²² Nonetheless, as a practical matter, they did have ruled in more cases against the reputation claims raised by

¹²⁰ See *supra* note 6.

¹²¹ Wei Yongzheng (魏永征), *Yang Lijuan Mingyu Quan An yu Zhiqing Quan* (杨丽娟名誉权案与知情权) [The Yang Lijuan Reputation Right Case and the Right to Know], *Guoji Xinwen Jie* (国际新闻界) [INTERNATIONAL NEWS MEDIA], no. 10, 2009.

¹²² The voluntary public figure concept was known to have only been dispensed by the court in one other case involving an obscure actor, and the court did not find such concept as relevant there. *Liu Yi Su Luo Yongkang Mingyu Quan Jiufen An* (刘一诉罗永康名誉权纠纷案) [Case of Reputation Right Disputes Filed by Liu Yi Against Luo Yongkang] (2014).

individuals who voluntarily sought publicity. In the 2011 case of Dou Kou, for example, the Shanghai court denied the claim for reputation damages filed by a self-proclaimed young prodigy against a critic of his.¹²³ The child was promoted by his parents as a gifted writer who allegedly started publishing novels at the age of six. The critic on a television program discussed the child's diaries, to which he was given access, and he voiced a concern that the child may already have a twisted personality thanks to a parenting approach centered upon excessive pursuit for vanity. The court, without even expressly addressing the privacy issue concerning the diary, reasoned that Dou, as a published writer, should tolerate critiques.¹²⁴

b. Compared with involuntary figures

The media property approach applied to voluntary public figures in China is remarkable also in light of the general trend in Chinese law towards an increasingly higher level of privacy protection for ordinary citizens, including those who did not intend to seek fame and publicity but nonetheless found themselves at the center of the media spotlight. As a Jiangsu court in 2005 illustrated, for example, the Chinese courts in involuntary figure cases could go so far as to find against a television station for running a news program that discloses an individual's criminal record, even though such information had been made public previously in another station's program.¹²⁵

¹²³ Dou Jia Yin Mingyu Quan Jiufen An (窦甲因名誉权纠纷案) [Case of Reputation Dispute Filed by Dou Jia] (2011) (hereinafter the *Dou Kou Case*).

¹²⁴ *Id.*

¹²⁵ Liu Jia Deng Su Jiangsu Jiaoyu Dianshi Tai Zhuanbo Hanyou Yinsi Neirong de Xinwen Qinfan Mingyu Quan An (刘甲等诉江苏教育电视台转播含有隐私内容的新闻侵犯名誉权案) [Case of Reputation Right Infringement Filed by Liu Against

In 2008, the same year when the landmark voluntary figure case of *Yang Lijuan* was decided by the Guangzhou courts, plaintiff Wang Fei filed a privacy suit in a Beijing court against a friend of Wang's deceased wife and two Internet firms operating blogging and online forum services. Wang's wife committed suicide as she discovered Wang's affair with a co-worker, and after her death the friend set up a blog to post articles by and about the wife which documented Wang's affair and the wife's suicidal intent.¹²⁶ Articles on the blog also disclosed Wang's name, address, profession and other personal information, which was subsequently reposted on another online forum. Angry netizens quickly tracked down Wang and harassed him offline, forcing him to quit his well-paying job at a marketing firm. The court decided for Wang, finding that his privacy was violated by both the unauthorized disclosure of his private life matters and the mass online dissemination of his personal information.¹²⁷ In so ruling the court rejected the defense of the friend that Wang's privacy interest be outweighed by the public interest in exposing him for the immoral behavior that caused tragic consequences.¹²⁸

Again, as previously noted, extramarital sex and promiscuity are no crime in mainland China,¹²⁹ but the prevailing social norm continues to tolerate and even approve the practice of public shaming as a means of achieving justice for the adulterers

Jiangsu Education Television Concerning Televised News Program That Discloses Private Matters] (2005).

¹²⁶ See the *Wang Fei Case*, *supra* note 80. Further background of the case also see Weiwei Shen, *Online Privacy and Online Speech: The Problem of the Human Flesh Search Engine*, 12 U. PENN. ASIAN L. REV. 268, 276-82 (2016).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See *supra* note 78.

and the wronged spouse.¹³⁰ The court's decision for Wang Fei, however, flew in the face of such norm that approves crowd-sourced sanctions against adulterers. Through applying the property rule to protect an adulterer's privacy, the court in effect was refusing to acknowledge the legitimacy of netizens as moral enforcers.

Nonetheless, in another case also involving an outraged Internet crowd, a Jiangsu court in 2015 ruled against the privacy claim raised by a child and his adoptive parents amid a social media sensation over photos suggesting that the child may have been subjected to corporal punishments by the adoptive parents.¹³¹ None of the parties involved are of any public notoriety before the incident. But the court ruled that since the alleged child abuse potentially implicates criminal offense, and thus concerns compelling public interest, the posting of said photos should not be held liable for infringing upon privacy and reputation.¹³² One obvious factor to square the different outcomes of this case and the *Wang Fei* case is the perceived difference in the severity of adultery versus child abuse as wrongful behaviors. These two cases of involuntary figures, as combined, highlight a more nuanced and content-based approach to privacy

¹³⁰ Li Site (李斯特), *Yinsi yu Yinsi Quan de Xiandu: Cong Renrou Sousuo Diyi An Qieru* (隐私与隐私权的限度——从人肉搜索第一案切入) [Right to Privacy and Its Limits: Starting from the First Human Flesh Search Engine Case], *Falv he Shehui Kexue* (法律和社会科学) [Law and Social Sciences] (2013); Liu Han (刘晗), *Yinsi Quan Yanlun Ziyou yu Zhongguo Wangmin Wenhua* (隐私权、言论自由与中国网民文化) [*Privacy, Free Speech and Netizen Culture in China*], *Zhongwai Faxue* (中外法学) [Peking University Law Journal] no. 4, 2011.

¹³¹ Shi Moumou, Zhang Moumou, Gui Moumou Su Xu Moumou Xiaoxiang Quan Mingyu Quan Yinsi Quan Jiufen An (施某某、张某某、桂某某诉徐某某肖像权、名誉权、隐私权纠纷案) [Case of Disputes Over Likeness, Reputation, and Privacy filed by Shi, Zhang, Gui against Xu] (2015).

¹³² *Id.*

protection than those adopted by China's legal authorities to ordinary citizens as voluntary public figures.

c. Inalienability rule

Although Yang Lijuan's spectacular tenure as a groupie had been able to draw societal wide gasps in 2008, in the subsequent decade she was apparently outdone by a new generation of wannabes who, in the age of social media, reality shows, and live-streaming apps, seem willing to expose themselves in literally whatever manner so long as it acquires them eyeballs.¹³³ Indeed, in the intensely competitive attention economy, while established celebrities would often have to resort to PR tactics based on rumored love affairs and wardrobe malfunctions, it is not surprising at all that the wannabes will have to enter the legally risky territory of soft pornography or other, even more offensive forms of exhibitionism.¹³⁴

In connection with this trend, the Party-state has applied an inalienability rule similar in nature to that for the popular celebrities, which through primarily the work of censorship authorities imposes shutdowns on online contents involving small online

¹³³ See China's Mania for Live Streaming Reaps Big Rewards for Online Celebrities, SCMP (Mar. 14, 2016), <http://www.scmp.com/lifestyle/arts-entertainment/article/1922898/chinas-mania-live-streaming-reaps-big-rewards-online> (reporting on the popularity of personalities on live-streaming platforms among Chinese web users).

¹³⁴ Laura He, *China's Crackdown on Internet Live-Streaming to Shake Up the Industry*, SCMP (Mar. 7, 2017), <http://www.scmp.com/business/companies/article/2076708/crackdown-internet-live-streaming-shake-industry>; Rebecca Tan, "It's All About the Porn": China's Latest Crackdown on Live Streaming, VOX (Jul. 7, 2017), <https://www.vox.com/world/2017/7/7/15922928/pornography-china-live-streaming-female-anchors-porn-censorship-dissent>.

personalities' controversial exhibitionist behaviors. While such periodical campaigns against "online vulgarism," as the target is typically referred to, have also been found as mostly temporary as for their effect, when in force they do notably squeeze the opportunities for the wannabes to trade their privacy for clicks, follows, and eyeballs.¹³⁵

C. *Summary: China's Regressive Public Figure Privacy Regime*

1. Summary of the descriptive account

The descriptive account in the foregoing Section II.B presents China's public figure privacy law in action as a status-based, tiered regime. To summarize its key features, first, government officials in China enjoy strong privacy protection under a property rule, which is effected through primarily the Party-state's information censorship practices, until they become expelled from official ranks and as a result subjected to government-administered or acquiesced public shaming. In addition, under some circumstances, an alienability rule could apply to certain government officials in order to censor or even prohibit their voluntary self-disclosure.

Second, China's popular celebrities in the new millennium have fared relatively poorly in the privacy realm, as the legal authorities have treated them most often with a media property rule approach that tilts in favor of the public's interest in gawking and gossiping. That said, in a minority of cases the courts did appear inclined to take the more balanced approach of liability rules. Nonetheless, the media property rule regime appears dominant as long as the expose of celebrities in question implicates serious

¹³⁵ *Id.*

moral or even legal transgressions. Besides, it may be observed that at times the censorship authorities have also taken an inalienability rule approach to curb celebrities' marketing operations with their own private life matters.

Third, cultural dignitaries, a class that would presumably have become increasingly lumped together with other types of celebrities in the age of a commercialized culture and media, are in fact still a recognizably distinct group for their privacy law treatments in the twenty-first century China. These cultural dignitaries have been rather consistently accorded a higher level of privacy protection, based primarily on a property rule approach, than the popular celebrities.

Fourth, voluntary public figures have been the type of public figures on whom the Chinese courts have by far taken a remarkably harsh, pro-disclosure stance, and it appears particularly so once we contrast the no privacy treatment for these figures with the more nuanced and often more protective approach the law has taken for other ordinary citizens who did not seem to actively engage in attention-seeking. And similar to popular celebrities, a censorship-based inalienability rule has also been applied by the authorities against the aspiring ordinary citizens who engage in aggressive exhibitionism in pursuit of fame.

The following table summarizes these descriptive findings:

Approach Type of Public Figures	Media property rule	Liability rule	Property rule	Inalienability rule
Government officials	Fallen officials		Incumbent officials	Censorship on personal narratives and images
Popular celebrities	Majority approach	Minority approach		Temporary paparazzi shutdowns
Cultural dignitaries			Most common approach	
Voluntary public figures	Most common approach			Temporary vulgarism bans

Table 1.2: China's status-based public figure privacy regime

2. The regressive effect

How are we to assess the primary effect of China's public figure privacy regime, as so described in the foregoing, on the society's distributional landscape of reputation? As the classical economic theory of information privacy generally counsels, privacy protection enables a person to manipulate his or her public image and reputation.¹³⁶ A privacy regime that does not somehow reduce its protection for the society's elites, often the "haves" in reputation terms, is thus often understood to at least reinforce, if

¹³⁶ Richard A. Posner, *The Right of Privacy*, 12 GA L. REV. 393, 394-404 (1977).

not augment, the extant distributional disparity in the possession of reputation capital across societal classes.¹³⁷

The Chinese privacy regime, in this vein, may be readily identified as regressive in terms of its distributional impact. Most of all, although a trace of the influence of *Sullivan v. New York Times* can surely be spotted here and there, China's public figure privacy regime lends overall stronger protections to some of the powerful and influential in its society than not only the U.S. but also the European regimes typically do to their elites. Indeed, for an average Western observer, he or she must find it counter-intuitive, to say the least, to see that Chinese plaintiffs from time to time would even argue in court, in straight face, that because exactly of their status as "public figures" must their reputation and privacy interest be afforded greater, rather than less, protection than ordinary citizens.¹³⁸ Meanwhile, it is exactly in contrast with such a favorable stance towards these elites that, despite the often invoked consideration of public interest, the Chinese law's treatment of privacy claims made by those without the "right" status looks particularly "liberal" but harsh.

It should not be forgotten, for sure, that an individual's actual capability to guard his or her personal life and promote a good public image depends more than protections backed by legal and regulatory authorities. In Lawrence Lessig's terms, for example,

¹³⁷ FRIEDMAN, *SUPRA* NOTE 71.

¹³⁸ Gong Moumou yu Xianning Ribao Wangluo Chuanmei Zhongxin Mingyu Quan Jiufen Shangsu An (宫××与咸宁日报网络传媒中心名誉权纠纷上诉案) [*Appellate Case of Reputation Right Dispute Between Gong and Xianning Daily Online Media Center*] (2014) (plaintiff arguing that the press's disclosure of his criminal record is particularly damaging because he is an individual who attracts lots of public attention notoriety).

people in real-world contexts could and often do resort to privacy shields available from outside of the law, such as in the territories of market, social norms, and architecture.¹³⁹ In that vein, although the level of legal and regulatory protection may not translate immediately and exactly to the actual amount of privacy a public figure practically attains for herself, what it surely affects must be the cost and burden one has to bear in order to maintain a grip over her public image.¹⁴⁰

Generally speaking, a permissive rule for nonconsensual publicity imposes on public figures a high cost for privacy self-protection and reputation management, potentially resulting in less wealth for the public figures, more information for the public, or both. A more restrictive rule, by contrast, lowers the burden on public figures, potentially leading to greater wealth for them and/or less information for the public. The regressive effect of China's public figure privacy regime, in such vein, should thus be properly understood also as resulting from its divergent cost implications for different groups in pursuit of building and preserving their reputation capital.

That privacy law can have a regressive impact on a society's distribution of reputation is not novel in general terms. Legal historians such as James Q. Whitman and Lawrence Friedman have told fascinating origin stories of privacy law in both the old and new continents arising primarily as a protective institution for the robber barons, self-made upstarts, and other respectable members of the society.¹⁴¹ And in analyzing

¹³⁹ LESSIG, *SUPRA* NOTE 35 AT 86-95.

¹⁴⁰ See e.g. Richard A. Posner, *Privacy, Secrecy, and Reputation*, 28 *BUFF. L. REV.* 1, 22 (1979) (theorizing privacy as good that people spend resources to purchase).

¹⁴¹ Whitman, *supra* note 17; FRIEDMAN, *SUPRA* NOTE 71.

the Trans-Atlantic divergence in the contemporary context, Lior Strahilevitz also surmises that the more protective regime in Europe for celebrity privacy, as compared with its U.S. counterpart, has regressive distributional effect as the former will reduce ordinary citizens' access to authentic information about celebrity life and behavior.¹⁴²

What sets China's public figure privacy regime apart from the familiar models in the West, however, is not simply the presence of apparent winners and losers out of the regime's operations, but the overtly strategic and interventionist role the political authorities have played in effecting such regressive pattern of reputational redistribution through privacy law and regulations. Most evidently, as China's privacy regime accords divergent levels of protection to different categories of public figures, its generally favorable treatments for incumbent officials and the opposite approach to handling purged officials reveal a pattern of deliberate information maneuvering by the Party-state authorities. Moreover, as it differs from the common Western paradigms, China's privacy regime has particularly emphasized the regulatory use of media censorship, which allows the Party-state to not only effect more capacious property rule protections for some individuals' privacy entitlements but also confiscate the ability of others to voluntarily marketize their own personal life. These suggest that through its privacy regime the Chinese state may be seeking to exert a significant level of control over whom the society will respect and despise.

In the next Parts III and IV, I explore the cultural and political logic underlying

¹⁴² Lior Jacob Strahilevitz, *Towards a Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010, 2017 (2013).

China's status-based public figure privacy regime. Part III identifies a persistent system of cultural outlook that may have lent considerable normative support to the social legitimacy of this regressive regime. Part IV discusses how such public figure privacy regime may be understood as tactics deployed by the Chinese state in upholding its authorities in the realm of political control and moral governance.

III. MORAL ELITISM IN CHINA'S PRIVACY CULTURE

While this Article's main argument concerns how privacy law may have been used by the Chinese state as a strategic instrument for control, a simplistic factor of hypocrisy, though real and apparently attempting, does not suffice in itself to explain the dynamics that undergird China's status-based public figure privacy law. Instead, as privacy law is typically understood to reflect or even track culture,¹⁴³ there are also noteworthy elements in China's traditional and contemporary cultural systems that likely have served normative grounds for its unique institutional practices on public figure privacy.

In this Part, I explore such cultural perspective. The following purports to show that China's privacy culture, as it evolves from the pre-modern into contemporary times, may have served a salient normative framework of reference that both informs and facilitates the construction and operation of the public figure privacy regime currently in place.

¹⁴³ See e.g. ALAN F. WESTIN, *PRIVACY AND FREEDOM* (1967); Whitman, *supra* note 17; A WORLD WITHOUT PRIVACY: WHAT LAW CAN AND SHOULD DO 246-47 (Austin Sarat ed., 2015).

A. *Moral Elitism as China's Traditional Privacy Norm*

As a body of socio-historical studies insightfully reveals, despite the short history of privacy law in modern China, an intricate system of privacy norms in Chinese culture have had existed for centuries.¹⁴⁴ Without constructing a comprehensive account of China's privacy traditions, here my focus is to identify the cultural norm that has been critical to the Chinese privacy sensibilities, which for shorthand is referenced here as "moral elitism." The essence of moral elitism in traditional Chinese culture concerns the hierarchical Confucian notion about the special roles of political and intellectual elites as moral leaders in society.¹⁴⁵ Embedded in such a normative framework, privacy is not the vindication of equal individuality for everyone, but a rather privileged treatment for those individuals whose good name needs be kept for the public good of a stable societal moral order.

The most celebrated privacy sensibility in traditional Chinese societies was that espoused and elaborated by the literati who, consisting of the educated ruling class, developed a complex system of norms to safeguard a physical and spiritual life space reserved for personal solitude and peace.¹⁴⁶ Critically, the value of having such a space

¹⁴⁴ See e.g. BARRINGTON MOORE, *PRIVACY: STUDIES IN SOCIAL AND CULTURAL HISTORY* 219-66 (1984); CHINESE CONCEPTS OF PRIVACY, *SUPRA* NOTE 104.

¹⁴⁵ I use "Confucian" loosely here and focus first on the social practice instead of the ideology. Obviously I will not go into greater detail here about the ever-lasting literati debate over which "denomination" of the "Confucian" ideas is the truly authentic "Confucian." For the general description of the hierarchical forms of social relations in Confucianism, see KENNETH SCOTT LATOURETTE, *THE CHINESE: THEIR HISTORY AND CULTURE* 400 (1964).

¹⁴⁶ See e.g. Charlotte Furth, *Solitude, Silence and Concealment: Boundaries of the Social Body in Ming Dynasty China*, in CHINESE CONCEPTS OF PRIVACY, *SUPRA* NOTE 104 AT 28, 47-52 (describing the traditional cultural notion and practice that links an individual's spiritual and physical health to solitude and abstinence).

is not justified by concerns about the literati's own well-being. Instead, such space allows the elites to focus on cultivating and strengthening their own moral integrity that supports their public function in governance.¹⁴⁷ Moreover, shielding the ruling class's private space also serves the purpose of reducing distraction potentially caused by the public exposure of the amoral, banal, and unseemly part of daily life, in particular those taking place in the bedroom or the bathroom.¹⁴⁸ According to the same logic, meanwhile, the folk society was then considered to have much lesser need for a protected private space. Things about them that need be shielded from the public view relate primarily to sexual secrecy because, again, such matters are considered irrelevant, or in fact counterproductive, to preserving moral integrity for the whole community.¹⁴⁹

Privacy in traditional China, therefore, can be understood as normatively oriented towards recognizing and respecting the expectation for the physical and spiritual private space where the community, as opposed to the individuals, needs it in order to uphold

¹⁴⁷ See *id.* at 47-52.

¹⁴⁸ A well-known story from the Book of Han, the official history for the Han Dynasty (206 BC to 23 AD) composed by Ban Gu in the year of 111 AD, tells that when the emperor, out of curiosity, questioned a high level official if the report was true that he helped his wife with her make-ups, the official reminded the emperor of the norm that the imperial court should not become open to the discussion of such private matters, and the emperor was immediately convinced. See Han Shu Zhang Gu Zhuan (汉书·张敞传) [Book of Han – Biography on Zhang Gu] (the original text reads “Weifu Huamei Changan Zhong Chuan Zhang Jingzhao Meiwu Yousi Yi Zou Chang Shang Wenti Dui Yue Chen Wen Guifang zhi Nei Fufu zhi Si You Guoyu Huamei Zhe Di Wu Shi er Buwen” (“为妇画眉，长安中传张京兆眉妩，有司以奏敞，上问之，对曰‘臣闻闺房之内，夫妇之私，有过于画眉者。’帝悟，释而不问。”)). Also see Peter Zarrow, *The Origins of Modern Chinese Concepts of Privacy: Notes on Social Structure and Moral Discourse*, in CHINESE CONCEPTS OF PRIVACY, SUPRA NOTE 104 AT 143 (noting the continuation of the influence of self-cultivation among literati from ancient to modern times).

¹⁴⁹ A generally accepted and applicable norm since the Song dynasty provides, for example, that “shameful secrets within or concerning the family shall not be disseminated outside of it” (*jiachou buke wai yang*, 家丑不可外扬).

a generalized moral order. And since in the Confucian tradition a person's locale in the hierarchy of social class corresponds to such individual's moral responsibilities to the society,¹⁵⁰ being among the rank of political and cultural elites accordingly serves the most salient heuristic for one's deserve for privacy. That, indeed, lies in the essence of the normative justification for why the emperor and the literati serving the imperial court enjoy the greatest seclusion within the tall walls of the Forbidden City and the guarded ministerial chambers, whereas the peasants' home, by contrast, may from time to time be entered into at their landlords' will.¹⁵¹

B. *Continuity and Leveling Down*

Given its root in Confucianism, not surprisingly, moral elitism's cultural influence may be observed in the law of other East Asian countries.¹⁵² Moreover, one may note that such moral elitism as described in the Chinese context is also not unfamiliar in the privacy culture of Western societies before the twentieth century.¹⁵³ But the more interesting story for China here, however, is about how the traditional privacy culture

¹⁵⁰ See LATOURETTE, *SUPRA* NOTE 145.

¹⁵¹ As Yan Yunxiang documented in his ethnography in a northern village of China, before the communist revolution, the landlords would casually stepped into their tenants' home and sat on the *kang* without taking off shoes, which were otherwise typically expected etiquette from visitors. The tenants, when visiting the landlords' residence, dared not to even look around. See Yan Yunxiang (阎云翔), *Cong Nanbei Kang dao Danyuan Fang (从南北炕到“单元房”)* [*From the Communal Kang to single family apartment*], in *Zhongguo Xiangcun Yanjiu (中国乡村研究)* [CHINA RURAL STUDIES] (Philip C.C. Huang (黄宗智) ed., 2003) at 183.

¹⁵² For example, in Singapore, it has been observed that public officials receive elevated legal protection for their honor against assault in the form of defamation. See David Tan, *The Reynolds Privilege in a Neo-Confucianist Communitarian Democracy: Reinvigorating Freedom of Political Communication in Singapore*, SING. J.L.S. 456 (2011).

¹⁵³ FRIEDMAN, *SUPRA* NOTE 71 AT 68 (noting that the reputation of men who governed, who set the tone and the example for the rest, was considered as the reputation of society in general).

of moral elitism has evolved and carried on its influence to the present day.

In fact, as is well known, the Chinese society since the middle of the nineteenth century had undergone a tumultuous process of modernization.¹⁵⁴ To fast forward, under the communist government since 1949, the Party-state had deliberately sought to dismantle China's traditional structure of political and social authorities and instead endeavored to reconstruct a new system of moral order.¹⁵⁵ Moral elitism in its traditional form did not, in fact, survive the turmoil. Instead, with the establishment of the socialist state, the party and government authorities now became solely authorized to define Chinese citizens' expectation of privacy in the top-down fashion. And in theory, under a surveillance and dossier system borrowed from the Soviet Union, all citizens, and in particular the political elites in the regime, were in principle not to keep any material information about themselves from the knowledge of the Party-state.¹⁵⁶

That said, in the early days of the communist government, the socialist state's perception of public morality and decency bore notable similarities to that of the pre-modern Chinese society. First, the socialist state continues to accept that secrecy should be allowed where there is a perceived need for protecting public morals. In a noteworthy piece of privacy-related national legislation in 1956, the law formally provided for the

¹⁵⁴ See generally JOHN KING FAIRBANK, *THE GREAT CHINESE REVOLUTION 1800-1985* (1987).

¹⁵⁵ See DINGXIN ZHAO, *THE POWER OF TIANANMEN* 41-42 (2001).

¹⁵⁶ See HONG YUNG LEE, *FROM REVOLUTIONARY CADRES TO PARTY TECHNOCRATS IN SOCIALIST CHINA*, CH.13 (1990) (describing the personnel dossier system of China). While the dossier system is generally known as applicable to primarily urban citizens, it is also worth noting that similar personnel file system existed in the rural systems too, mostly for the purpose of recording farm work contributions as a basis for distribution.

exemption of “private matters in the shadow” (*yin(1) si(1)*)¹⁵⁷ of individuals from public trial proceedings.¹⁵⁸ “Private matters in the shadow,” the predecessor in the Chinese language to the modern term of “privacy,” was well understood to mean sexual facts.¹⁵⁹ To specifically legislate to keep sex out of the public eye, at a time when any national legislation was otherwise scarce, certainly reminds one of the ancient practice that judicial officials were required not to make women appear in open courts.¹⁶⁰

Second, despite its proclaimed egalitarian agenda, the socialist state did not actually eliminate hierarchies in social and political realms, including even some that were clearly remnants from the pre-revolutionary past.¹⁶¹ Although after 1949 the

¹⁵⁷ Some translates “*yin(1) si(1)*”(隐私) as “shameful secrets.” See Lu Yao-Huai, *Privacy and Data Privacy Issues in Contemporary China*, 7 ETHICS AND INFORMATION TECHNOLOGY 7 (2005). The word “yin”(1) in “*yin(1) si(1)*” nevertheless may or may not have a strong connotation of shame, and therefore in this paper I prefer translating in a more literal way, i.e. using “yin” for its most neutral meaning as space in the shadow.

¹⁵⁸ Quanguo Renda Changwei Hui Guanyu Bu Gongkai Jinxing Shenli de Anjian de Jueding (全国人大常委会关于不公开进行审理的案件的决定) [*National People's Congress Standing Committee Decision on Not Publicly Trying Some Cases*] (1956).

¹⁵⁹ In fact, as early as in the 1950's, the Chinese term now used to translate “privacy,” namely “concealed private matters” (*yin(3) si(1)*,”“隐私”), already had appeared in intellectual writings, and although absent notable discussion about any distinction in meanings between these two terms, the intellectual writings suggested that “concealed private matters” were understood to be somewhat, if not very significantly, broader than only sexual affairs. See Li Zhui (李缀), Ye Tantan Fengci Ju: Xie Ju Zatan zhi Er (也谈谈讽刺剧——写剧杂谈之二) [*On Satire Plays: Essays on Writing Scripts*], Juben (剧本) [SCRIPTS], no. 6, 1957 at 71.

¹⁶⁰ Historical record on ancient court protocols noted that one common guidance is “Funv Mo Qing Huan” (妇女莫轻唤) (meaning not to call women to court unless absolutely necessary). See Wang Huizu (汪辉祖), Zuozhi Yao Yan (佐治药言) [USEFUL ADVICE ON GOVERNANCE] at 9-10 (Xu Ming & Wen Qing (徐明、文青) eds., 1998).

¹⁶¹ A concise summary of the hierarchical arrangements, see Martin King Whyte, *China's Post-Socialist Inequality*, CURRENT HISTORY 229, 229-30 (Sept. 2012). What it put in place, instead, was a new system that continued to classify citizens for their moral worth, although the evaluation now turns on such measures as party membership, bureaucratic position, family background, urban versus rural residency

traditional norms about the elevated social status for the mandarin and the literati class no longer applies, the socio-political system under the Party-state nevertheless produced its own political and cultural elites who were associated with the regime as close as the traditional literati were with the imperial court. The input of these elites, in turn, were visible in the state-approved privacy norms at the time. Most notably, the PRC Constitution of 1954 expressly included a provision for citizens' "residence" and "secrecy in correspondence," which mirrors similar languages in the several constitutions of the Republic of China since 1912.¹⁶² In a country then of very low general literacy or possession of private property, this constitutional guarantee reflected obviously the interest of the elites as opposed to the mass.

Given such background, the privacy norm of moral elitism had in fact been carried forward, albeit in just a different form, into the early years of the socialist state. However, the continuity in such sense had suffered major disruptions during the years of Maoist radicalism between the late 1950s and mid-1970s. As the Maoists pushed aggressively for their agenda of "egalitarianization,"¹⁶³ in the privacy sphere the elites under the new regime not surprisingly took the most heat. In the two constitutions of 1975 and 1978,¹⁶⁴ compared with their 1954 predecessor, correspondence "secrecy"

status and others as the state solely determines.

¹⁶² See *Zhonghua Minguo Linshi Yuefa* (中华民国临时约法) [Interim Constitution of the Republic of China] (1912), Art. 6 (providing that citizens enjoy, among others, rights to residential sanctity and correspondence confidence).

¹⁶³ William L. Parish, *Destratification in China*, CLASS AND SOCIAL STRATIFICATION IN POST-REVOLUTION CHINA 84-120 (James L. Watson ed., 1984). Also see generally RODERICK MACFARQUHAR AND MICHAEL SCHOENHALS, *MAO'S LAST REVOLUTION* (2008).

¹⁶⁴ *Zhonghua Renmin Gonghe Guo Xianfa* (中华人民共和国宪法) [PRC CONSTITUTION] (1975), ART. 28; *Zhonghua Renmin Gonghe Guo Xianfa* (中华人民

was removed from the text. Instead, during the Cultural Revolution, the elites' privacy interest was subjected to the constitutionally guaranteed "Four Big Freedoms" of the mass (i.e. "Big Voices, Big Expressions, Big Font Posters, Big Debates").¹⁶⁵ These "freedoms" were invoked often to justify egregious privacy violations, such as home intrusions and searches, surveillance and disclosures, "open struggle sessions," correspondence interceptions, and breaches of confidentiality in personal dossiers.¹⁶⁶ And such were inflicted on not only the old but also new elites under the communist government, including senior party leaders, bureaucrats, leftist intellectuals and the "politically aspiring activists."¹⁶⁷

In some sense, what had happened to privacy norms in China during the first thirty years of the communist government may therefore be described as a process of "leveling down": Although at the outset of the Party-state's rule moral elitism had maintained its influence by morphing into a different form, as the subsequent rise of radical egalitarianism led to the denunciation of any notion implicating the moral superiority of elites, the elites within the destabilized state were rendered to legitimately

共和国宪法) [PRC CONSTITUTION] (1978), ART. 45.

¹⁶⁵ Zhonghua Renmin Gonghe Guo Xianfa (中华人民共和国宪法) [PRC CONSTITUTION] (1975), ART. 13; Zhonghua Renmin Gonghe Guo Xianfa (中华人民共和国宪法) [PRC CONSTITUTION] (1978), ART. 45.

¹⁶⁶ See e.g. Bai Lei (白磊), Cong Duoquan dao Junguan 1967-1968 Nian Shaanxi Sheng Wudou (从夺权到军管——1967-1968年陕西省武斗) [*From Power Struggle to Military Control: Violent Struggle in Shaanxi Province from 1967 to 1968*], Minjian Lishi (民间历史) [UNOFFICIAL HISTORY], <http://mjls.hk.cuhk.edu.hk/Book.aspx?cid=4&tid=1520> (oral history narrative documenting incidents of massive breach in confidentiality of the personnel dossier system during the Cultural Revolution).

¹⁶⁷ SEE GENERALLY MACFARQUHAR & SCHOENHALS, *SUPRA* NOTE 163, in particular Chapters 11, 14 & 15.

expect no more than the minimum privacy available for the average workers and peasants.

C. *Resurrecting Moral Elitism*

In the wake of the radical “leveling down,” moral elitism reemerged in China’s privacy sphere as part of a larger project to rebuild the country’s political and cultural institutions. Most of all, since 1978, China’s senior leadership, together with a group of lawyer-party cadres, had set out to construct a modern legal system from about scratch.¹⁶⁸ As both groups had suffered and yet survived the Maoist purges in the previous decade, they shared similar visions about using laws to restore an authoritative order of respect and decency.¹⁶⁹ For example, in 1979, the newly enacted Criminal Law criminalized public insults, defamation, violation of correspondence secrecy and intrusion on residence,¹⁷⁰ all of which offenses readily invoked the lawmakers’ recent memories of the widespread chaos instigated by the Red Guards.¹⁷¹ Likewise, in the new constitution of 1982, which subsequently stayed in use through the present day, the “Four Big Freedoms” were no longer in place and citizens’ right to personal dignity,

¹⁶⁸ A very informative oral history by a participant of the process, see Liang Huixing (梁慧星), *Nanwang de 1979 – 1986 (难忘的 1979—1986)* [*Unforgettable Years of 1979 to 1986*], Zhongguo Faxue Wang (中国法学网) [IOLAW.ORG.CN] (Jun. 2010) at <http://www.iolaw.org.cn/showArticle.aspx?id=2665> (Professor Liang Huixing describing in detail the political process and academic debates during the very early years of China’s legal reconstruction project in the wake of the Cultural Revolution).

¹⁶⁹ *Id.*

¹⁷⁰ Zhonghua Renmin Gonghe Guo Xingfa (中华人民共和国刑法) [PRC CRIMINAL LAW] (1979), §§45 & 149.

¹⁷¹ Wang Liming (王利明), *Wo de Renge Quan Qingjie (我的人格权情结)* [My Passion for the Law of Personality Right], *Fazhi yu Shehui (法治与社会)* [RULE OF LAW AND THE SOCIETY], no. 11, 2016 at 64 (noting that the 1986 enactment of personality right in the GPCL was based on the reflections of massive infringement of individual reputation and privacy during the Cultural Revolution).

residential sanctity and freedom and secrecy in correspondence again became affirmatively and unequivocally guaranteed in the constitutional text.¹⁷²

In addition, from 1979 to 1982, authorities also did not forget to re-insert into a series of procedure laws the requirement that “private matters in the shadow” (i.e. sexual matters) be handled by both courts and lawyers in a non-public manner.¹⁷³ Notably, in the 1978 version of an authoritative Chinese language dictionary, the term “concealed private matters” (*yin(3) si(1)*), the then accepted translation of the concept “privacy,” was already defined quite broadly as “personal matters one does not wish to disclose or publicize.”¹⁷⁴ In 1982, the contemporary term “concealed private matters/privacy” first appeared in the Chinese legal nomenclature in the Civil Procedural Law, which included several clauses to restrict public access to information and the use of open court proceedings where “state secrets and personal *privacy*” are of concern.¹⁷⁵

As some commentators speculated at the time, that authorities chose to use the word “privacy” in the Civil Procedural Law reflected their acceptance of both the

¹⁷² Zhonghua Renmin Gonghe Guo Xianfa (中华人民共和国宪法) [PRC CONSTITUTION] (1982), ART 38 & ART. 45.

¹⁷³ Zhonghua Renmin Gonghe Guo Xingshi Susong Fa (刑事诉讼法) [PRC Criminal Procedural Law] (1979); Zhonghua Renmin Gonghe Guo Renmin Fayuan Zuzhi Fa (人民法院组织法) [PRC People’s Court Organization Law] (1979); Lvshi Zanxing Tiaoli (律师暂行条例) [Provisional Regulation on Lawyers] (1980).

¹⁷⁴ Xiandai Hanyu Cidian (现代汉语词典) [MODERN CHINESE LANGUAGE DICTIONARY] (1978).

¹⁷⁵ Zhonghua Renmin Gonghe Guo Minshi Susong Fa (民事诉讼法) [PRC CIVIL PROCEDURAL LAW] (1982), §§45, 53, 58&103. Notably, until the early 1990’s the legal terms have not been unified across legal documents. Even in certain official documents issued by the SPC to its lower courts in the early 1990’s, “private matters in the shadow” (阴私) as opposed to “privacy” (隐私) was still the term used .

expanded personal space and the need for certain separation between personal matters and public concerns.¹⁷⁶ That personal matters, such as “conjugal relations in divorce cases, amount of assets in estate disputes and secrecy in adoption,” would become litigated in courts in the late 1970s also attests to the emergence of a private realm in the country’s social and economic life since the reformist policies in 1978.¹⁷⁷ Nonetheless, it is important to understand that preventing public dissemination of intimate information had little to do with vindicating individuality in the liberal sense, which notion at the time was still formally regarded as contradicting the party line.¹⁷⁸ Instead, the perceived virtue of such legal norms was primarily to maintain a prudish and stable moral order, which the authorities worried may be again endangered if the general public were exposed to distracting sexual details released from local courts and police authorities as they insensitively handle sex-related cases.¹⁷⁹

¹⁷⁶ Jin Xinnian (金信年), *Cong Yi Zi zhi Jian Xiangdao Xing Min zhi Bie (从一字之见想到刑、民之别)* [*Distinguishing Criminal and Civil Law Matters Based on One Word*], *Fa Xue (法学)* [LEGAL SCIENCE], no.8, 1982 at 13. This was not shared by all scholars at the time, however, as some believed the choice of word in Civil Procedure Law was actually a mistake and should be changed back to “dark private matters.” See Yang Ziyuan (杨自元), *Yi Zi zhi Jian: Jianyi Yinsi yu Yinsi Tongyi Qilai (一字之见——建议“阴私”与“隐私”统一起来)* [*On One Word: Yin(1)si and Yin(3)si Should Be Unified into One Concept*], *Fa Xue (法学)* [LEGAL SCIENCE], no.6, 1982.

¹⁷⁷ Yan noted, for example, that a crucial change in the rural family life after the Cultural Revolution was the rise of conjugality. YUNXIANG YAN, *PRIVATE LIFE UNDER SOCIALISM: LOVE, INTIMACY, AND FAMILY CHANGE IN A CHINESE VILLAGE 1949-1999* (2003).

¹⁷⁸ See generally MERLE GOLDMAN, *SOWING THE SEEDS OF DEMOCRACY: POLITICAL REFORM OF THE DENG XIAOPING ERA*, CH.5 (1995) (describing the rise and suppression of liberal discourse during the early years in the wake of Cultural Revolution).

¹⁷⁹ Tigao Bugao de Zhiliang (提高布告的质量) [*To Improve the Quality of Public Announcements*], *Renmin Sifa (人民司法)* [People’s Judiciary], no.2, 1980 at 29. According to this essay written for the lower courts, some courts included rather lewd languages in publicizing rape cases such as “...multiple attempts to rape without

In 1987, as previously noted, the enactment of the GPCL codified the right of reputation, among other personality rights, in the universally applicable term. As a matter of law in book, such legislative move represented the start of a “leveling up” process that, similar to what Whitman had observed in the history of German privacy law,¹⁸⁰ was to bring up privacy protection for all Chinese citizens to a level identical to the elites.

For law in action, however, the actual commencement of the leveling up had to be pushed back for at least another decade. Instead, during 1980s and 1990s, as the rise of commercialized media¹⁸¹ started to bring the privacy concerns of China’s political and cultural elites to the front stage of public discourse, the *Yang Mo Case* of 1987, as previously described, illustrated that the old generation of elites, closely associated with the Party-state regime, turned out to be the group whose reputation suits had the best chance of being vindicated in courts. In contrast, in several well-known litigations over reputation and likeness between 1988 and 1995, the Chinese courts were much less sympathetic to the reputation and misappropriation of likeness claims filed by non-elite plaintiffs.¹⁸² The upshot of China’s elite-led reconstruction of a nominally universal

being able to penetrate...” and “ holding [the victim] tightly and refusing to release [her]...”

¹⁸⁰ Whitman, *supra* note 17 at 1166-67.

¹⁸¹ Background history about China’s media commercialization since the 1980s and in the twenty-first century, *see e.g.* Josephs, *supra* note 1 at 191-93 (1993); Chengju Huang, *Towards a Broadloid Press Approach: The transformation of China’s Newspaper Industry Since the 2000s*, 17 *JOURNALISM* 652, 654-7 (2016); YA-WEN LEI, *THE CONTENTIOUS PUBLIC SPHERE: LAW, MEDIA & AUTHORITARIAN RULE IN CHINA* 78-82 (2018).

¹⁸² In a widely publicized suit against the Central Fine Arts Institute in 1988, three models sued for unauthorized use of their nude portraits in an open exhibition held by the defendant. The case was in the end resolved in favor the plaintiffs, but only 10

privacy norm, in such light, appears foremost to be the resurrection of the privacy sentiments of the political and cultural elites who, in the wake of the Cultural Revolution, had reestablished their moral authorities inside the Party-state regime.

D. *Summary*

The relation between law and culture is not necessarily causal in one way or the other, but the two are often mutually-dependent. In history, moral elitism as China's privacy culture has played an important role in informing and legitimizing China's privacy practices. In the final two decades of the twentieth century, moral elitism reemerged, albeit in a new form, during the process in which the Party-state's political elites reconstructed the country's privacy regime according to their own vision about moral authority. To note, that an ancient status-based norm system transforms itself into new expressions and thus continues its influence over the modern society is not all surprising a finding. In many ways, the resurrection of moral elitism in contemporary China is highly comparable to how, as Reva Siegel once famously explained, the antebellum common law of marital unity became preserved yet transformed into the modern regime marital privacy.¹⁸³

Without claiming that such cultural norm being the causal force for China's contemporary regime of public figure privacy, the normative influence of moral elitism is evidently an important angle as we try to make sense of the descriptive patterns presented in the foregoing Part II. Specifically, while in the West the introduction of

years after they filed the suit. *See* Zhu, *supra* note 21.

¹⁸³ *See generally* Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2174 (1995-1996).

public figure doctrine to privacy law is typically understood as functioning to bring down the privacy protection for the society's elites to a level that is lower than that for the average citizens, in China the revealed social acceptance for the law to afford greater protection to some of the most politically and culturally established members of the society¹⁸⁴ suggests a lasting impact of moral elitism.

Meanwhile, as the public figure regime became more formally instituted in the new millennium, the most widely accepted application of the pro-disclosure, media property rule approach has been to the new generation of social elites, in particular the popular celebrities, a group that ascended as a result of the socialist state's permission of commercial media and cultural consumerism. The new generation of celebrities acquired their fame, wealth, and influence not by any authority-sanctioned claims about moral superiority, but instead through primarily marketizing their attractiveness. Under a normative outlook of moral elitism, these new celebrities are endowed with a much weaker claim for deserving privacy protection because they are neither traditionally nor officially perceived as shouldering a high level of moral responsibility in the society.

IV. PRIVACY AS AGENT CONTROL

The privacy culture of moral elitism sheds light on a critical resource upon which

¹⁸⁴ Occupational prestige studies conducted by sociologists have consistently found that government officials and scientists are the two groups enjoying highest perceived prestige among the Chinese public. See e.g. Wei Jianwen & Zhao Yandong (尉建文、赵延东), *Quanli Haishi Shengwang Shehui Ziben Celiang de Zhenglun yu Yanzheng* (权力还是声望? ——社会资本测量的争论与验证) [*Power or Prestige? Debate Over and Test of Measuring Social Capital*], *Shehui Xue Yanjiu* (社会学研究) [SOCIOLOGICAL STUDIES], no.3, 2011; Yanjie Bian et al., *Occupation, Class and Social Networks in Urban China*, 83 SOCIAL FORCES 1443 (2005).

China's contemporary public figure privacy regime has drawn and may continue to draw on normative persuasion and legitimization. Nonetheless, culture, when understood as mostly a system of normative claims about value, is better not taken as the determinative factor to how institutional practices sustain and operate as they do.¹⁸⁵ In this Part, I explain that China's contemporary public figure privacy regime has taken its current shape likely also because the Party-state uses information privacy regulation as a practical lever, with which it seeks to enlist, induce, and control increasingly diverse groups of elites and influentials in the Chinese society to serve its governance agenda in the political and moral realms.

Importantly, this agent control theory and the previously discussed cultural theory are not mutually exclusive but instead closely related. On one hand, the moral elitism that persists in the twenty-first-century Chinese ethos helps legitimize and facilitate the Party-state's strategic maneuver with the status-based privacy regime. On the other hand, the Party-state's practices of leveraging privacy for political and cultural control also operate to reinforce and reinvigorate the contemporary, statist version of moral elitism that, in the age of commercialized mass media and digital consumerism, has been constantly subjected to challenges from the rise of diverse sources of moral reputation and influence.

A. *Control of Political Elites*

It should be generally straight-forward to see how China's public figure privacy regime functions as a control mechanism over government officials: As it combines a

¹⁸⁵ Cf. Whitman, *supra* note 17 at 1203 (“Law is always something of a jumble”).

property rule approach for incumbents, a media property rule for the purged, and an inalienability rule to contain politically risky self-disclosure, the privacy regime affords the Party-state maximum control over the making and breaking of an official's public reputation.

Overall, the power to define who's good and who's bad within the Party-state's intensely orchestrated political arena is of clear importance to its interest in keeping an orthodox narrative about the history, the present, and the future.¹⁸⁶ In particular, as the inalienability rule approach is applied most often and saliently to the Party-state's top elites, it reflects the regime's perception of a paramount need for controlling those individuals whose self-disclosure about life experiences and personal thought, if not properly curated, could pose most serious threat to a unitary interpretation of political history.¹⁸⁷

At the more micro-level, for the average government officials who are concerned about their reputation, what the system produces are conceivably strong incentives for them to pledge allegiance to the higher authorities. In particular, as a structural matter, information censorship as a power resource is vertically distributed within China's government system, with higher authorities in possession of greater discretionary power to restrict information flow in a much broader geographical scope. Such structure could strengthen the centripetal force that pushes government officials to fall in line

¹⁸⁶ A case study on how the Party-state sought to take control over the political narrative on government corruption, see Carolyn L. Hsu, *Political Narratives and the Production of Legitimacy: The Case of Corruption in Post-Mao China*, 24 *Qualitative Sociology* 25 (2001).

¹⁸⁷ See *id.*

with those higher up than themselves for, aside from other considerations, the latter's access to greater censorship power.

In the time of commercialized press and, in particular, the Internet-based media and communication, the incentives must have increased considerably for government officials of low and middle ranks to pledge their allegiance for access to censorship protection against the curious or even investigative gaze over their personal life. What's at stake here for officials, notably, is not only their privacy and face. More importantly, the unwanted publicity of an official's personal facts often provides lead and also creates pressure for party disciplinary authorities to initiate investigations and disciplinary actions.¹⁸⁸ In the early 2010s, for example, prosecutions of several local officials for corruption charges were commenced right after the dissemination on the Internet of pictures and reports that showed them, respectively, wearing luxury watches or smoking expensive cigarettes.¹⁸⁹

In addition to well-known reports about all levels of officials trying to mobilize certain censorship resources to cover up questionable conduct or relationships,¹⁹⁰ one other revealing pattern was that local officials reportedly constitute a major client base for the market providers of reputation management services who are engaged to delete web pages containing unfavorable information about the officials.¹⁹¹ Such reports

¹⁸⁸ Peter Lorentzen, *China's Strategic Censorship*, 58 AM. J. POL. SCI. 402 (2014).

¹⁸⁹ William Wan, *In China, Officials' Watches Get Watched*, WASH. PO. (Sept. 14, 2012), https://www.washingtonpost.com/world/asia_pacific/in-china-officials-watches-get-watched/2012/09/13/4e9937f2-f8e4-11e1-8398-0327ab83ab91_story.html?utm_term=.5f692cd9fd11.

¹⁹⁰ Senior leaders' cover-up effort, *see supra* note 49.

¹⁹¹ Qidi Shantie Chanye Da Kehu Guanyuan Mingxing he Shangshi Gongsi (起底“删帖产业”大客户：官员、明星和上市公司) [*Getting to the Bottom of the Major*

further attest to the concentration and scarcity of effective government censorship capability, which therefore must have been desperately sought after by many low and middle-level officials.

Besides, one oft-heard complaint about a pro-disclosure public figure doctrine is that such rule of privacy may deter well-qualified individuals from pursuing prominent political offices.¹⁹² What could be the entrance incentive provided by China's privacy regime? Generally speaking, there does not seem to be much a hint that the privacy regime in China could have played any role in dissuading talented individuals from pursuing a position, either low or high, in the government system. Granted, as public offices in China are not practically open for popular election, there is little opportunity to observe, in a similarly transparent way as in the U.S. context, that highly qualified individuals make a deliberate choice not to join the campaign for government jobs. But logically, the lack of highly publicized campaign process could also suggest that Chinese individuals should be less likely discouraged from taking government positions

Client Base for the "Web Cleansing Industry": Government Officials, Celebrities, and Listed Companies], Diyi Caijing (第一财经) [YICAI.COM] (May 20, 2015), <http://www.yicai.com/news/4620069.html> (reporting that government officials are among the major clients of reputation management agencies who are engaged to seek take-downs of negative expose on the web); Wang Chen et al., Shantie Shengyi (删帖生意) [*The Business of Post Deletion*], Caixin Zhoukan (财新周刊) [CAIXIN WEEKLY] (Feb. 18, 2013), <http://magazine.caixin.com/2013-02-08/100490897.html> (reporting that one major reputation management agency disclosed it derived 60% of its profit from deleting negative online news stories and other information on behalf of government officials, such as police chiefs and county heads, from second and third-tier cities, who allegedly were willing to pay at least RMB500,000 per job).

¹⁹² Anthony Lewis, *Sex and Leadership*, N.Y. Times (Feb. 23, 1998), <https://www.nytimes.com/1998/02/23/opinion/abroad-at-home-sex-and-leadership.html> ; Anita L. Allen, *Privacy and the Public Official: Talking About Sex as a Dilemma for Democracy*, 67 GEO. WASH. L. REV. 1165, 1179-80 (1999); Tan, *supra* note 152 at 460.

for privacy concerns. And as a circumstantial fact related to this point, successful business people in China have in the past two decades eagerly sought after official status such as members of the local or national legislative or political consultative bodies, with some even taking the road to transforming themselves into full-time government officials.¹⁹³

B. *Control of Celebrities*

1. Background: The rise of a commercial market for celebrity reputation

In contrast to government officials, whom can be viewed as agents of the Party-state in the most intuitive sense, how are we to conceive the relationship between the Party-state and other types of public figures, such as the popular celebrities and cultural dignitaries, also through a similar lens of agency?

To see how that is plausible, one may start with noting that, for the most recent history, the Chinese state's control apparatus in the cultural spheres consisted primarily of not only an official system of propaganda administration bodies and state-controlled media agencies, but also state-operated organizations and institutions that kept on government payrolls an army of "cultural workers," including authors, fine artists, performance artists, athletes, and, in relatively loose sense, academics.¹⁹⁴ Before the rise of today's massive cultural marketplace and celebrity economy,¹⁹⁵ the Chinese

¹⁹³ Pan Che, *What Fallen Officials Did To Get Ahead and Avoid Getting Caught*, CAIXIN (Sept. 15, 2017), <https://www.caixinglobal.com/2017-09-15/101145839.html>.

¹⁹⁴ See Deborah S. Davis, *Intergenerational Inequalities and the Chinese Revolution*, 11 MODERN CHINA 177 (1985).

¹⁹⁵ PwC estimates that in 2016 the industrial output value generated through just the Internet celebrities exceeded 58 billion yuan. See PwC: *China Entertainment and Media Outlook 2016-2020*, <https://www.pwccn.com/en/entertainment-media/em-china-outlook-nov2016.pdf>.

state used to generally exercise very capacious control over all individuals working in the cultural realm through administrative and organizational means.¹⁹⁶ Not only may the authorities often micro-manage the production of artworks, but they also overtly sought to dictate the general reputation of individual artists through the power to publicly appraise or shame their work and person.¹⁹⁷

The emergence and expansion of market-based production of popular culture since the 1980's have paradigmatically weakened authorities' control over cultural production and influence. On one hand, the formerly state-controlled art and sports organizations, although not completely disbanded, have gone through a process of reform that resulted in a significant decline of both their numbers and popular influence.¹⁹⁸ On the other hand, a new class of popular celebrities has become minted now often not within the orbit of the authorities' direct reach but instead in the cultural market based on their own talents and marketability.¹⁹⁹

Such new source for the creation of reputation and influence conceivably posed a challenge to the Party-state. The authorities had at one point in the 1980s reacted to such perceived threats to its cultural orthodoxy by resorting to such old-school techniques of open political suppressions.²⁰⁰ The episode of the Tiananmen Square in

¹⁹⁶ Back then cultural producers were all “national cadres” in the state propaganda system. Shi-lian Shan, *Chinese Cultural Policy and the Cultural Industries*, 5 City, Culture and Society 115, 116 (2014).

¹⁹⁷ *See id.*

¹⁹⁸ *Id.* at 117.

¹⁹⁹ *See generally* Elaine Jeffreys and Louise Edwards, *Celebrity/China*, in *CELEBRITY IN CHINA* 1-4 (Elaine Jeffreys & Louise Edwards eds. 2010).

²⁰⁰ Such as the 1983 campaign against “spiritual pollution” and the 1987 campaign against “bourgeois liberalization.” *See generally* GOLDMAN, *SUPRA* NOTE 178 (documenting the 1983 and 1987 campaigns).

1989 ostensibly proved that the authorities' initial attempt to crack down on pop culture, although unsuccessful, may not be all over-reacting: From the Party-state's perspective, the risk of allowing a class of new elites to wield their popular influence beyond the Party-state's control had, in fact, materialized when pop stars and rock singers had contributed in major ways to a rebellious political discourse during the process of the Tiananmen Square protests.²⁰¹

In subsequent decades, and in particular in the new millennium, however, the Party-state has shifted towards a much more nuanced set of strategies as it copes with the challenges from the rise of the cultural market as a new and competing source of reputation and influence. Privacy regulations, as the following explains, may be considered as an important component of such strategy.

2. Controlling celebrities through privacy

The agent control theory here posits that China's privacy regulation enables the Party-state to strategically intervene into the market production of celebrity reputation, through which the Party-state may exert a level of control over the new class of social influentials.

Before looking into the more specific control mechanisms, a preliminary question that needs be addressed here is for what objectives the Party-state could be seeking to

²⁰¹ Cf. ZHAO, *SUPRA* NOTE 155 AT 49-50 (noting the rise of pop culture as one major social background factor in the years leading up to the Tiananmen Square protest). Briefly recounting a personal role of a rock-n-roll star in the event, see Clarissa Sebag-Montefiore, *Cui Jian, the Godfather of Chinese Rock 'n' Roll, Talks About Tiananmen*, *WSJ* (Jun. 5, 2014), <https://www.wsj.com/articles/cui-jian-the-godfather-of-chinese-rock-n-roll-talks-about-tiananmen-1401969989>.

enlist celebrities as its agents in either the express or implicit sense. Notably, till the present day, as a matter of its official stance, the Party-state has insisted that all those working in the broadly-defined “cultural fronts” heed the party line in promoting, through cultural works, a set of officially sanctioned, mainstream political and moral values.²⁰² Such official stance surely does not mean that the Party-state in the new millennium continues to dictate and micro-manage the work and life of each and every “cultural worker” as it did in the prior era. The key message it conveys here, instead, is that the authorities expect the celebrity power and influence to facilitate, as opposed to disrupt, undermine, or contradict, the authoritative ideological line in the sphere of public cultural discourse. It is in such sense that we could find an actual or constructive principal-agent relation between the Party-state and the popular celebrities.

With the nature of the agency relationship clarified, in below I discuss three plausible facilitative roles that the Party-state may expect celebrities to play in contemporary China’s cultural politics, which are referred to as “moral lessons,” “role models,” and “distractions.”

a. Celebrity as moral lessons

This first type of role the Party-state may have envisioned for celebrities can be observed from the practice that incidents of celebrities’ moral failures are often used as

²⁰² Xi Jinping zai Wenyi Gongzuo Zuotan Hui Shang de Jianghua (习近平在文艺工作座谈会上的讲话) [*Xi Jinping’s Remarks at the Conference on Cultural Works*], Xinhua (新华) [XINHUANET] (Oct. 15, 2014), http://www.xinhuanet.com/politics/2015-10/14/c_1116825558.htm (“The pursuit of art is the pursuit of the Party and the people, and the front of art is an important front of the Party and the people).

lessons for vindicating the officially promoted mainstream moral code.

Compared with its Western counterparts, the contemporary Chinese state and its government apparatus have been very explicit about its interest in preserving a relatively static, semi-official moral code in an otherwise drastically changing society.²⁰³ In many ways, the set of moral norms that the Chinese state has been officially preaching to its citizens in the twenty-first century may be viewed as resembling the puritanical value system of “moderation” in the nineteenth century’s North America, as it emphasizes such daily life norms as rule-abiding, no overindulgence in alcoholism and gambling, sexual self-restraint, and faithful to marriage.²⁰⁴ While such a set of prudish norms indeed continue to reflect China’s mainstream moral culture, as many have noted, the Party-state’s effort to preserve and enshrine the same also derives from its general interest in suppressing a greater level of moral diversity that could threaten its grip over political power.²⁰⁵

To preserve and promote moral norms the public must constantly be reminded of the norms’ existence and forces. Vivid, real-life moral lessons, in particular stories that

²⁰³ See Shehui Zhuyi Hexin Jiazhi Guan Jiben Neirong (社会主义核心价值观基本内容) [Basic Components of the Socialist Core Values], Renmin Wang (人民网) [People.cn] (Feb. 12, 2014), <http://theory.people.com.cn/n/2014/0212/c40531-24330538.html> (setting forth a set of officially enshrined “core values” for the Chinese society, namely “prosperity and strength,” “democracy,” “civility,” “harmony,” “liberty,” “equality,” “just,” “rule of law,” “patriotism,” “good work ethic,” “honesty and trust,” and “benevolence.”); Helen Gao, *The Chinese Communist Party’s Guide to Moral Living*, N.Y. TIMES (Nov. 15, 2017), <https://www.nytimes.com/2017/11/15/opinion/chinese-communist-party-xi-jinping.html>.

²⁰⁴ FRIEDMAN, *SUPRA* NOTE 71 AT 63.

²⁰⁵ Gary Sigley, *Sex, Politics and the Policing of Virtue in the People’s Republic of China*, in *SEX AND SEXUALITY* 47-48 (ELAINE JEFFREYS ED. 2006)

illustrate transgressions and their consequences, are thus indispensable.²⁰⁶ And because of the easy public attention it attracts, a case of a public figure's moral failure is obviously suitable teaching material for the society to observe and reflect on the extant moral norms.

Contemporary China's gossip tabloid, as that of everywhere else, has indeed never fallen short of salacious expose of personal moral stories that range from controversies to scandals.²⁰⁷ The most frequent protagonists of China's moral theater, meanwhile, are popular celebrities. That, as previously discussed, should have much to do with the divergent approach of privacy regulation that predominantly applies a media property rule to popular celebrities whereas a property rule to at least most of the political elites in power. From the authorities' perspective, compared with incumbent government officials, singers, actors, and athletes apparently fit the role of moral lessons much better, since the moral failure of the latter will much less likely reflect on the regime's own moral image. And in this vein, the more permissive privacy regime on celebrity gossips and expose not only adds a shaming element to the punishment imposed on celebrity individuals who dare violating the mainstream moral code, but it also effectively conscripts the relevant individuals as unwilling agents for broadcasting the general lessons about what moral norms should be observed in the contemporary Chinese society.

There is one catch here, however, about the strategy of using celebrities as moral

²⁰⁶ *Cf.* FRIEDMAN, *SUPRA* NOTE 71 AT 12 (explaining that highly salient cases of punishment of crime and transgressions, albeit far from ridding the society of norm violations, reaffirm and support the moral boundary of the society).

²⁰⁷ Liebman, *supra* note 1.

lessons. One risk a dominant moral code usually faces is that the façade of conformism could inadvertently unravel if the society at large somehow comes to form an impression that norm violations are actually wide-spread.²⁰⁸ In China, while the Party-state officially remains stern against such serious norm transgressions as sex and drug scandals, there is no question that the society's general attitude is gradually shifting towards greater tolerance for these behaviors.²⁰⁹ And one sign of such attitudinal shift is indeed a sympathetic tone that one at times may witness in the public commentaries ensuing media reports on celebrity scandals.²¹⁰ Ostensibly, the Chinese authorities have lately begun to take more seriously such risk of "excessive" expose of celebrity scandals. These concerns most likely underlie the inalienability rule approach the Party-state has taken in implementing the temporary and periodical paparazzi bans.²¹¹

Such concerns also help us understand China's approach to the privacy of voluntary public figures. As previously noted, China's approach to voluntary figures, as illustrated by the hostile, media property rule applied by the courts in such cases as

²⁰⁸ FRIEDMAN, *SUPRA* NOTE 71.

²⁰⁹ *Cf.* Liebman, *supra* note 1 at 1059 (Noting that many bemoan the decline of moral standard in China as the state's control over individuals' lives decreased along with the rise of the market economy).

²¹⁰ For example, web users may show empathy towards actresses who were exposed for engaging in adultery. *See e.g.* Ni Zai Qianze Bai Baihe Chugui Wo Que Tongqing Bai Baihe Que Ai

(你在谴责白百何出轨，我却同情白百何缺爱) [You Denounce Bai Baihe for Cheating but I Sympathize Her for Want of Love], Tianya (天涯) [Tianya Forum] (Apr. 15, 2017), <http://bbs.tianya.cn/post-funinfo-7423637-1.shtml>. Others suggested that the focus of the paparazzi on celebrities as opposed to government officials must be a conscious policy choice. *See e.g.* Jiaru Bagua Jizhe Buzai Dingzhe Mingxing Ershi Dingzhe Difang Guanyuan Baodao Name...??? (假如八卦记者不再盯着明星，而是盯着地方官员报道，那么.....? ? ?) [*What If Paparazzi Turn to Local Government Officials from Celebrities?*], Zhihu (知乎) [ZHIHU.COM], <https://www.zhihu.com/question/45432336>.

²¹¹ *See supra* text accompanying notes 98-102.

Yang Lijuan (zealous groupie) and *Dou Kou* (self-claimed child prodigy), poses a remarkable contrast with the increasingly pro-privacy stance it adopts with respect to involuntary figures, even though the latter in such cases as *Wang Fei* (adulterer whose wife committed suicide) appears also to teach a great lesson about morality. Conceivably, such divergence amounts to pouring a bucket of cold water on the enthusiasm of the celebrity wannabes. Nonetheless, such disincentives may be of only questionable force in the contemporary media environment, in particular that of online social media, where countless aspiring individuals engage in controversial to scandalous exhibitionism.²¹² The recent waves of “anti-vulgarism” crackdowns, accordingly, reflect the Party-state’s assessment of how overboard online exhibitionism has already gone. To the extent that the average, aspiring Joe and Jill are not deterred by the privacy risks arising from subtler legal mechanisms, the Party-state must then have perceived a need to forcefully shut down the popularization or even normalization of unorthodox ways of life.²¹³

b. Celebrity as role models

As the flip side of their first type of role as moral lessons, celebrities may also be promoted by the authorities as salient, positive exemplars to whom the general public

²¹² Shuju Zaojia Neirong Disu Wangluo Zhibo Pingtai Daodi Gai Zenme Wan (数据造假、内容低俗 网络直播平台到底该怎么玩?) [*Fake Data and Vulgar Content: How to Play the Live-Streaming Game?*], Beijing Qingnian Bao (北京青年报) [Beijing Youth] (Aug. 7, 2016), <http://finance.chinanews.com/cj/2016/08-07/7963941.shtml>.

²¹³ Xinhua She: Disu Wangluo Zhibo Tiaozhan Daode Dixian Weihai Shehui Gonggong Zhixu (新华社: 低俗网络直播挑战道德底线 危害社会公共秩序) [*Xinhua Agency: Vulgar Live Streaming Challenges Bottom-line of Morality and Harms Societal Public Order*], Xinlang Keji (新浪科技) [SINA TECH] (Jul. 27, 2016), <http://tech.sina.com.cn/i/2016-07-27/doc-ifyxunyxy5696536.shtml>.

could look up for how they conform to the officially approved moral values and norms.

To implement its expressive governance agenda, the Chinese state needs role models as much as moral lessons: While the former vividly illustrates bad karma, the latter serves proof that the officially promoted norms and values are not only desirable but also plausible in real life. Moreover, celebrity role models soften the image of party propaganda, and accordingly inspire a greater level of societal acceptance and conformism. Indeed, as the Chinese state's propaganda operations stumble into the new millennium, it obviously has come to realize that celebrity power as a PR tool for the Party-state is not only beneficial but perhaps even indispensable. In the last two decades, popular singers, actors, and athletes have constantly been enlisted by the government authorities for almost all variety of propaganda work, ranging from PSAs,²¹⁴ government-approved philanthropic pursuits,²¹⁵ propaganda-themed television programs and films,²¹⁶ and general government spokespersonship.²¹⁷ As Elaine Jeffreys observed, many popular celebrities have already been subsumed into even the mundane aspects of China's government process.²¹⁸

²¹⁴ Elaine Jeffreys, *Translocal Celebrity Activism: Shark-Protection Campaigns in Mainland China*, 10 ENVIRON. COMM. 763 (2016).

²¹⁵ *Sharing Their Wealth: Chinese Celebrities and Charity*, CHINA DAILY (Feb. 1, 2016), http://www.chinadaily.com.cn/celebrity/2016-02/01/content_23336373.htm.

²¹⁶ Ben Child, *Founding Epic Becomes China's Biggest Homegrown Film*, THE GUARDIAN (Oct 21, 2009), <https://www.theguardian.com/film/2009/oct/21/china-founding-of-a-republic>.

²¹⁷ Many Koetse, "Support China's New Era" Campaign Goes Viral on Chinese Social Media, What's On Weibo, Oct. 25, 2017, <https://www.whatsonweibo.com/support-chinas-new-era-campaign-goes-viral-chinese-social-media/> (noting a wave of celebrity Weibo posts with singers and actors posing for Party propaganda-themed photos).

²¹⁸ Elaine Jeffreys, *Political Celebrities and Elite Politics in Contemporary China*, 30 CHINA INFO. 58 (2016).

As the Party-state actively enlists celebrities as role models, it is certainly not so naïve as to expect that a good number of these individuals are in fact genuinely living the moral orthodoxy officially promoted, or that some kind of moral reconstruction may be effected upon these otherwise high-flying, free-willing individuals. What the Party-state mostly cares about, not surprisingly, is the surface, namely that many celebrities will behave in the public *as if* they aspire for and conform to the officially endorsed moral ideal.

Nonetheless, from the Party-state's perspective, even optics of conformism from popular celebrities cannot always be taken for granted. In the cultural market where attention rather than virtue is the central concern, many celebrities may have found it to make good commercial sense to cultivate for themselves a more or less rebellious public persona. The Party-state, therefore, has to resort to a variety of tactics to induce a necessary level of conformism from popular celebrities, among which privacy regulation can be viewed as one.²¹⁹

Most intuitively, the media property rule as applied to popular celebrities may produce useful incentives. Despite an increasing level of social tolerance, for Chinese celebrities negative publicities relating to serious sex and drug scandals continued to lead to marketing disasters that suspend or even terminate careers.²²⁰ The prospect of being subjected to a media property rule or an under-detering liability rule, accordingly,

²¹⁹ There are other enticements the state can utilize, such as granting them official status in the country's legislative and political consultation bodies. *See id.*

²²⁰ Stewart Chang, *Sex, Rice, and Videotape: Popular Media, Transnational Asian/American Masculinity, and a Crisis of Privacy Law in the Edison Chen Sex Scandal*, 37 AMERASIA JOURNAL 28 (2011).

has induced Chinese celebrities to invest heavily in privacy self-protection and reputation management.²²¹ From the Party-state's perspective, the conformist pressure in such passive forms is also welcome, because it refrains the celebrities from openly challenging the Party orthodoxy.

Yet more intricate are such privacy-based mechanisms that likely have produced incentives for celebrities to endorse and embrace the Party's moral line in a more open and active manner. As previously noted, unlike popular celebrities, cultural elites such as Yang Mo (senior party official/novelist), Yang Jiang (literary intellectual), and Yang Zhenning (Nobel-winning physicist) are afforded property rule protections for their privacy in the court of law and/or that of the public opinion. While the culture of moral elitism explains that their privileged treatments have much to do with the societal view about their moral deserves in the society, the presence of such an exalted status also implies that incentives could exist for at least some popular celebrities to try to climb the ladder and reach a similar status.

For an average popular celebrity, what may be the practicable route, if at all, to enter the class of cultural dignitaries? While the extant members of the class are primarily of an elder generation, as previously noted, cases such as that of *Zhang Yimou* (director of the Olympics opening ceremony) seem to illustrate how the class of cultural elites may become replenished in contemporary times. More specifically, as the Chinese

²²¹ See *Getting to the Bottom of the Major Client Base for the "Web Cleansing Industry": Government Officials, Celebrities, and Listed Companies*, *supra* note 191 (reporting that Chinese celebrities are keen on purchasing reputation management services so as to remove private information and images from the web); *supra* note 84 (celebrities purchasing hot search spot on Weibo for news stories about others in order to divert public attention away from their own scandals).

government periodically throws propaganda campaigns in preach of its moral ideologies, these programs practically serve a platform and salient focal point for celebrities to signal to authorities their allegiance through acting and speaking as government's spokespersons.

For those who work closely with the government in those pursuits, they may expect to earn from the authorities a formal or semi-formal appraisal of being “excellent in both morality and art” (*de yi shuang xin*),²²² a notation reminiscent of the earlier time when “cultural workers” were directly employed by the government. The most prominent ones among them, illustrated by Zhang Yimou, may also become viewed as effectively having ascended into the cultural dignitary category, leaving behind other celebrities previously as his peers. The reward, among others, could include the heightened privacy protection that the Party-state may provide through a property rule effected either by civil law or censorship. And moreover, even for those who may not have achieved enough to get “knighted” as such, as the *Inou* case suggests, demonstrating a good faith effort to cultivate a generally “healthy,” positive image that conforms to mainstream norms could be helpful at least in terms of appealing for more sympathetic ears from the court.²²³

Indeed, as one observes China's popular culture in recent years, a notable sign of

²²² Guo Chao (郭超), 47 Ren Huo Di Shi Jie Quanguo Deyi Shuangxin Dianshi Yishu Gongzuo Zhe (47 人获第十届"全国德艺双馨电视艺术工作者"荣誉称号) [47 People Awarded as “Nationwide Excellent Television Art Workers in Both Morality and Art”], Renmin Wang [人民网] (People.cn) (Jan. 23, 2018), <http://media.people.com.cn/n1/2018/0123/c40606-29779963.html>.

²²³ See text accompanying *supra* notes 96-7.

success in the Party-state's attempted use of celebrities as role models is that even many of the very young artists in China are predominantly choosing to cultivate a conformist image as opposed to adopting rebellious personalities.²²⁴ Privacy could not have done all the work, but that pattern certainly underscores the logic of privacy's function as just explained.

c. Celebrity as distraction

The third type of role the Chinese state may have envisioned for celebrities is to deflect media attention and public enthusiasm away from political issues by proliferating public discourse with hypes about celebrity gossips. The agency relationship between the Party-state and celebrities in this context is more properly viewed as a constructive one since celebrities themselves are unlikely aware when they are tasked with the distraction role.

In theory, China's asymmetric approach to privacy protections for celebrities and government officials appears well structured to produce such effect. Empirically, although there has not been much systemic evidence available, the apparent effect of distraction has been noted by many observers in a variety of episodes where incidents implicating government misconduct get flooded by celebrity gossips.²²⁵ Generally

²²⁴ Most recent example of such line of cultural policy was the crackdown on rappers who, as a group, are viewed as promoting a culture deviating from the society's mainstream moral norm. See Tracy You, *China Cracks Down on Hip-Hop and 'Artists with Tattoos' After Popular Rapper Was Pulled from Reality TV Show*, MAIL ONLINE (Jan. 2018), <http://www.dailymail.co.uk/news/article-5296551/Bad-rap-Chinese-fans-fear-crackdown-hip-hop.html#ixzz5CNKR3oka>.

²²⁵ C.f. MARGARET E. ROBERTSON, *CENSORED: DISTRACTION AND DIVERSION INSIDE CHINA'S GREAT FIREWALL* 43 (2018) (theorizing about distraction caused by flooding as a type of censorship China deploys).

speaking, the distraction effect of privacy law, as deliberately pursued by the Chinese state, would rather ironically attest to the Warren-Brandeis proposition that overconsumption of infotainment is antithetic to democratic self-government.²²⁶ And besides celebrity gossips,²²⁷ prior studies have also found distraction as a strategic pattern of China's speech regulation in other adjacent contexts.²²⁸

That said, distraction with celebrity privacy involves some further intricacies that need be addressed here. First, as previously discussed in connection with celebrities' role as moral lessons, exposing the general populace to an excessive amount of celebrity scandals could potentially undermine, as opposed to reinforce, the perceived authorities of the orthodox moral norms. In other words, as we consider the Party-state's moral governance agenda from a holistic perspective, it seems that too much distraction could backfire. There is no way to tell whether the Party-state has any deliberate plan for a Sisyphean search for "optimal" distraction.²²⁹ But the occasional application of

²²⁶ See Samuel D. Warren & Louis D. Brandeis, *Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890-1891) (arguing that the harm of proliferation of gossips relates to the belittlement of important public concerns and the lowering of societal moral standards). Similar normative assessment, see also Anita Allen, *Privacy Law: Positive Theory and Normative Practice*, 126 HARV. L. REV. F. 241, 243-44 (2013) (The individual readers who win the ability to access celebrities' personal lives may lose from the point of view of perfectionist conceptions of virtue. A balance of inattention to others' personal lives and attention to one's own is arguably a moral virtue).

²²⁷ It has long been observed that the Party-state's tolerance of cultural consumerism since 1980s has served as a substitute for greater political participation. See Josephs, *supra* note 1 at 194 (noting that as authorities placate the lower classes by allowing "yellow" journalism to flourish, they may have intended the same to serve as a substitute for greater political participation). See also Jeffreys, *supra* note 218 at 62.

²²⁸ The finding of King et al. suggests, for example, government uses astroturfing through the fifty cent parties to distract, instead of engage, public attention to controversial issues. Gary King, Jennifer Pan, and Margaret E. Robertson, *How the Chinese Government Fabricates Social Media Posts for Strategic Distraction, not Engaged Argument*, 111 AM. POLIT. SCI. REV. 484 (2017).

²²⁹ That said, such optimality analysis is surely plausible as an academic pursuit. See Lorentzen, *supra* note 188.

inalienability rule with paparazzi shutdowns, in that sense, should be understood as a responsive tactic to the perceived excess of distraction.

Second, for the general distraction strategy to work for the Party-state's political benefit, one important yet subtle assumption is that celebrity figures are unable to transport their popular influence accumulated in the relatively liberalized cultural market into the political sphere, and in particular not in such ways as the rock stars and pop singers did back on the Tiananmen Square in 1989. The functions of the permissive regime for celebrity gossips in China, in this vein, include one of containment: By affording the public abundant access to the infotainment laced with scandalous details of celebrity life, the Party-state also imprints in their mind the flawed moral characters of this new class of elites, whose prospect of influencing public opinion on political and social issues could thus become undermined.

The containment effect of China's celebrity privacy regime is illustrated by the decline in recent years of celebrity's influence as public opinion leaders in China's online social networks. In the late 2000s and the early 2010s, as the Chinese society was undergoing its first wave of Internet social networking boom, many popular celebrities rode the tide and engaged in various forms of political advocacy and activism that from time to time contradict and challenge the Party line.²³⁰ Such activism eventually ebbed after 2013. Besides some more overt speech restrictions imposed at the time,²³¹ one other relevant factor there was the intense media scrutiny on private

²³⁰ LEI, *SUPRA* NOTE 181 AT 122-125.

²³¹ Such as a set of judicial interpretive rules promulgated in 2013 to enable easier prosecution of criminal defamation. *See* Zuigao Renmin Fayuan Zuigao Renmin Jiancha Yuan Guanyu Banli Liyong Wangluo Shishi Feibang Deng Xingshi Anjian

life that led to a general bankruptcy of perceived credibility for many celebrity figures. For well-known examples, consider the former popular Weibo influentials such as A-list actress Yao Chen, prodigy novelist Han Han, and abrasive business investor Charles Xue.²³² Once all extremely popular personalities who cultivated for themselves the image of being outspoken on politically sensitive matters, these individuals subsequently retreated from social media after their credibility went into question resulting from intense media expose, in one case even directly orchestrated by the government,²³³ about their scandals ranging from serial adultery, plagiarism, and hiring prostitutes.²³⁴ In this vein, as the authorities intervene in the availability of celebrity privacy, the latter functions to not only distract people's attention by satiating their idle curiosity but also minimize the political threat potentially posed by the celebrities' popular influence.

C. *Implications: A "Victorian Compromise," Chinese Style?*

This Part's analysis reveals how China's status-based public figure privacy regime has functioned as a vehicle for the Chinese state to strategically incentivize and control

Shiyong Falv Ruogan Wenti de Jieshi (最高人民法院最高人民检察院关于办理利用网络实施诽谤等刑事案件适用法律若干问题的解释) [INTERPRETATION BY THE SUPREME PEOPLE'S COURT AND THE SUPREME PEOPLE'S PROCURATORATE OF SEVERAL ISSUES CONCERNING THE SPECIFIC APPLICATION OF LAW IN THE HANDLING OF DEFAMATION THROUGH INFORMATION NETWORKS AND OTHER CRIMINAL CASES] (2013). Further description of the crackdown, see LEI, *SUPRA* NOTE 181 AT 182-85.

²³² Five Big Vs made televised confessions between 2013 and 2016, as Lei accounted. See LEI, *SUPRA* NOTE 181 AT 187.

²³³ Ed Flanagan, *Detained Chinese-American Blogger Confesses to 'Irresponsible' Online Posts*, NBC News (Sept. 16, 2013), <https://www.nbcnews.com/news/other/detained-chinese-american-blogger-confesses-irresponsible-online-posts-f8C11172250>.

²³⁴ *Id.*

the country's political and cultural elites in service of the Party-state's political and moral governance agenda.

As China's privacy regime accords a greater level of protection to certain types of elites, it may appear in some sense comparable to the pre-modern privacy law in the Western societies, which are understood also as regressively inclined towards greater protection for the noble and the famous. As Friedman incisively theorizes, privacy law in the nineteenth century's North America played a critical role in maintaining a pattern of "Victorian Compromise," under which the society's respectable members were allowed some room to avoid the harshest consequences for their violations of the dominant, stringent moral code of moderation.²³⁵ According to Friedman, while the Victorian Compromise benefited the protected rich, powerful, and reputable, its general societal rationale was to preserve both the surface integrity of the moral code and the hard-earned social capital of the individuals.²³⁶ The rise of modern press and the associated free speech norms since the first half of the twenty century eventually unraveled the Victorian Compromise in the United States.²³⁷ What has accompanied that process, as Friedman observes, were changes in the society's moral code towards greater permissiveness.²³⁸

While Friedman's thesis has been questioned for its limited relevance to the modern context,²³⁹ it actually should not be difficult to see how it casts light on

²³⁵ FRIEDMAN, *SUPRA* NOTE 71 AT 66-80.

²³⁶ *Id.* at 67-68.

²³⁷ *Id.* at 213-15.

²³⁸ *See generally id.* at 4, 213-34.

²³⁹ Neil Richards' complaint is that it does not tell how to proceed with privacy law by finding out what values it may serve. Neil M. Richards, *Privacy and the Limits of*

understanding privacy and social control in those societies that currently still have more restrictive information regimes than that of the West. The Chinese public figure privacy regime in the twenty-first century, as described and analyzed in this Article, in fact, reflects social and cultural dynamics in some sense similar to the Victorian Compromise. Although the Chinese society has witnessed the emergence of highly diversified and more permissive moral outlooks, a dominant and relatively conservative moral code remains socially and politically influential. The privacy regime, meanwhile, appears also to achieve the similar regressive result that elites from time to time could manage to evade from unwanted gaze as they accumulate, preserve, and cash in their reputational assets.

Nonetheless, compared with the American common law courts' relatively subtle approach to supporting the Victorian Compromise, the Chinese Party-state has wielded a visibly interventionist hand when it uses public figure privacy law to regulate the public reputation of the society's elites. Specifically, the privacy regime that assigns divergent levels of protection to different types of elites operates as a system of not only reward but also punishment, –through government acquiesced or even engineered shaming–, so that the political and cultural elites face strong incentives to fall in line to promote, uphold, or at least refrain from challenging the Party-state's authority in the

History Lawrence M. Friedman, *Guarding Life's Dark Secrets: Legal and Social Controls over Reputation, Propriety, and Privacy*. Palo Alto: Stanford University Press, 2007. Pp. 360. \$29.95., 21 *YALE J.L. & HUMAN.* 165, 170 (2009) (“But history alone is insufficient to sort out the problems of modern privacy law, particularly as privacy law attempts to move forward to deal with new technological and social challenges.”)

moral sphere.

As previously noted, the Chinese state's strategic maneuvering of privacy appears effective in particular as it contributes to a surface of elite conformism. Nonetheless, it needs to be acknowledged that effectively regulating the societal access to information through privacy law and other policy techniques has without question become increasingly challenging for the Chinese state in today's communication environment. On one hand, for celebrities who expect little privacy protection from authoritative sources, they now turn to the increasingly available and abundant market tools for publicity and reputation management.²⁴⁰ On the other hand, for those elites who are treated as the more worthy subjects for the officially provided privacy shield, such formal protection is also far from foolproof as rumors, gossips and even investigative journalism materials from time to time arise in unexpected spots in the marketplace and slip even very stringent but never perfect censorship.²⁴¹

With its powerful, albeit not perfect, control over determining who's reputable and who's not, the Chinese Party-state has thus strived to remain as the most authoritative moral voice in the society. Beneath the relatively stable surface, however, the tension has without question been substantial and also growing between the state-sanctioned moral orthodoxy and the societal-wide moral practices. To speculate on a worst-case

²⁴⁰ See *supra* note 221.

²⁴¹ Liebman, *supra* note 1 at 1046 (noting that China has a long tradition of news spreading by rumor, or known in Chinese as "back alley news."). The corruption scandal of Wen Jiabao's family, for example, has been widely disseminated among the Chinese public via both online and offline channels despite the fact that the NY Times piece originally reporting on the matter was blocked and inaccessible from within China without using a virtual private network software. See *supra* note 49.

scenario, provided the divergent privacy treatments eventually may become too salient to miss and too difficult to square on any principle more neutral than the Party-state's will to power and control, a widely shared sense of hypocrisy could potentially threaten to unravel the façade of stable moralism. And in light of today's Internet-based communication and media architectures, the unraveling pressure upon the "Victorian Compromise, Chinese Style" in the twenty-first century could loom particularly large.

That said, however, compared with the American moral authorities in the nineteenth century, the Chinese Party-state has generally in its possession more capacious regulatory tools as it responds to new information challenges. As the Party-state has become inclined in recent years to pursue more restrictive approaches to privacy regulation, it likely is perceiving an even greater challenge from market forces that compete with it in producing reputation and influence. Whether the contemporary, tiered regime, with its nuanced and intricate features, will continue to suit the Party-state's need for ensuring a stable order under its authority may become increasingly subject to question. Intriguingly, though, besides its other possible implications, one consequence of the Party-state's current policy inclination for an overall greater information restriction could be a new round of "leveling up" in privacy protection, which may bring about greater privacy protection to perhaps all types of celebrities through both the implementation of censorship and the more pro-privacy rulings from the courts.

V. CONCLUSION

Nowadays there is little chance that public figure privacy makes it into the list of top concerns for privacy lawyers, but without question these problems continue to offer a most accessible window through which one learns about the meaning and stake of privacy in a given society. In this Article, I make a first systematic effort towards accounting for China's contemporary legal regime that regulates its public figure privacy problems. Through this process, I demonstrate that the Chinese privacy regime in the twenty-first century, as embedded in the Party-state's restrictive information regulation apparatus, differs in significant ways from the corresponding Western paradigms in terms of its operational structure, cultural logic, and political dynamics. In particular, while it has long been observed in the Western context that privacy law has subtle yet important implications on the social production and distribution of reputation, the analysis of the Chinese public figure privacy law here reveals an unconventional paradigm in which privacy may function, in a much more overt fashion, as the strategic policy lever for the state to intervene in the market of reputation and to aid political and social control.

While to learn, in the context of any given society, about the historical and present patterns and consequences of the interaction between the state and its elites is important for its own sake, the study of China's public figure privacy law should also inform our thinking about the politics of information for the future. Thanks to the rise of digital surveillance and big data-enabled systemization, reputation and its management have increasingly become a common concern for average members of the society. In the

Chinese context, as the Party-state's interventionist interest has predictably expanded from the market of elite reputation to that of the credit and evaluation on the mass, it will remain critical to examine privacy law, broadly understood as institutions governing the flow of personal information, from a perspective that centers on its role in the Party-state's endeavor of developing novel, reputation-based mechanisms for authority, governance and social control.

CHAPTER TWO

LEGAL REGULATION OF NETWORKED FALSEHOODS: A COMPARATIVE PERSPECTIVE

I. INTRODUCTION

The problem of falsehoods, misinformation, and disinformation has accompanied the commercial Internet since its advent. Until the very recent years, American legal theorists have given little more than passing attention to what the law may have to do with this peculiar problem of human communications. The stunning results of the 2016 U.S. presidential election, the U.K. “Brexit” referendum, and other salient events in the western hemisphere¹ have since brought about unprecedented lawyerly interests: More popularly referenced as “fake news,” this problem has in recent years been blamed by many for distorting the democratic political process.² The late influx of curiosity and research manpower notwithstanding, there has so far been limited progress in American legal discourse on this topic from where things were years before.

¹ See e.g. Craig Timberg, *Russian Propaganda Effort Helped Spread ‘Fake News’ During Election, Experts Say*, WASH. PO. (Nov. 24, 2016), https://www.washingtonpost.com/business/economy/russian-propaganda-effort-helped-spread-fake-news-during-election-experts-say/2016/11/24/793903b6-8a40-4ca9-b712-716af66098fe_story.html?utm_term=.b56d787312a7; Tim Harford, *The Problem With Facts*, FINANCIAL TIMES (Mar. 8, 2017), <https://www.ft.com/content/eef2e2f8-0383-11e7-ace0-1ce02ef0def9> (discussing the role played by misinformation during the Brexit referendum); Juliette Mauban Nivol & Jules Darmanin, *13 Times Misinformation Spread During The French Presidential Campaign*, BUZZFEED (Apr. 20, 2017), https://www.buzzfeed.com/juliettemaubannivol/15-pieces-of-misinformation-that-brainwashed-the-p-2ueaa?utm_term=.enRx76nJQM#.rfaP81rjRx.

² Casey Sullivan, *Outgoing Harvard Law Dean on Diversity, Fake News and Her Future Plans*, BLOOMBERG LAW (Jan. 4, 2017), <https://bol.bna.com/outgoing-harvard-law-dean-on-diversity-fake-news-and-her-future-plans/>

Were the issues entirely novel or never brought up as worthy of attention, it would have certainly been unfair to expect legal scholars to make significant contributions to the discussion at this juncture. In fact, however, early enthusiasts among legal scholars, in particular Professor Cass Sunstein, had since the late 1990s done a notable amount of theorizing for lawyers and policy analysts about why and how false rumors, conspiracy theories and the like are widespread and consequential on the Internet.³ Though surely having added to his reputation for scholarly ingenuity, Sunstein's works have fallen short of inspiring broad interests from American lawyers. And for those who are now turning to the problem today, the Sunstein treatises will also appear to them inadequate. Including his very latest book published in 2017,⁴ Sunstein's have focused primarily on informing the legal audience about the underlying social psychology and the potentially damaging effects of Internet falsehoods, of which social scientists have long known and diligently investigated in political and other contexts of social life. While Sunstein at times offered prescriptive discussions, such as on using legal liabilities to produce an optimal level of "chill" on falsehoods propagators,⁵ intervening polarized social groups through such behavioral strategies as "cognitive infiltration,"⁶ and constructing online channels and domains for information deliberation through administrative actions and incentives,⁷ he has overall refrained

³ See e.g. CASS R. SUNSTEIN, *THE LAW OF GROUP POLARIZATION* (1999); *REPUBLIC.COM* (2001); *REPUBLIC.COM 2.0* (2007); *ON RUMORS* (2009); *GOING TO EXTREME* (2011); *CONSPIRACY THEORIES* (2015); *#REPUBLIC* (2017).

⁴ CASS SUNSTEIN, *#REPUBLIC* (2017).

⁵ See e.g. SUNSTEIN, *ON RUMORS*, *SUPRA* NOTE 3 AT 71-80.

⁶ Cass R. Sunstein & Adrian Vermeule, *Conspiracy Theories: Causes and Cures*, 17 *J. POL. PHIL.* 218 (2009).

⁷ Compare *REPUBLIC.COM 2.0*, *SUPRA* NOTE 3 AT 192-210, with *#REPUBLIC SUPRA* NOTE

from indicating that these prescriptions are anything more than early-stage brainstorming.

By and large, subsequent lawyerly writings on networked falsehoods, including most recent ones, are doing little more than duplicating Sunstein's social science-informed explanations and ambivalent hints for legal and regulatory interventions.⁸ As lawyers keep dancing around the missing, law-themed piece of the puzzle, the contrast grows ever starker in the literature between the saturation of diagnostic talks and the dearth of analyses of legal regulation. In some sense, this state of contemporary discourse is more intriguing than what Lawrence Lessig once complained about the debates over spam regulation, in which legal regulation was simply overlooked as even potentially relevant a response.⁹

American lawyers' reluctance against thinking about networked falsehoods in more interventionist, regulatory terms, as this Article argues, reflects largely the unique American free speech mindset,¹⁰ which, for all its virtues, unfortunately often forecloses critical and explorative thinking on many aspects of the relationship between law and information in the Internet age. The late surge of lawyerly interests in networked falsehoods refreshes the appeal for overcoming this mindset, at least to some extent and in some contexts, so that progress can be made towards better understanding

3, AT 215-33.

⁸ See e.g. Noah Feldman, *Fake News May Not Be Protected Speech*, BLOOMBERG LAW (Nov. 23, 2016), <https://www.bloomberg.com/view/articles/2016-11-23/fake-news-may-not-be-protected-speech> ; SUNSTEIN, #REPUBLIC, *SUPRA* NOTE 3.

⁹ LAWRENCE LESSIG, *CODE 2.0* 262 (2006).

¹⁰ See Frederick Schauer, *The Exceptional First Amendment*, in MICHAEL IGNATIEFF (ED.), *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 29 (2005).

the current and future information challenges to law and society. This Article aspires to fill the gap in an analysis of the legal regulation of networked falsehoods. Drawing upon scholarship in Cyberlaw, free speech, and social science research on media and networked communications, this Article examines, through a positive and comparative lens, how legal regulation operates on the social behaviors, processes, and other dynamics underlying the problem of networked falsehoods. To this end, I include in this Article an illustrative and critical case study centering upon China's evolving regulatory practices over networked falsehoods. Using this case study I highlight new perspectives for lawyers, including and in particular those from the American legal tradition, for considering the possible roles legal regulation may play as part of the overall institutional and societal responses to networked falsehoods and associated internet governance problems.

While conceptual matters are primarily dealt with in the below Part II, here I make a preliminary note on terminology. By “networked falsehoods” I refer in this Article broadly to a suite of problems involving the wide dissemination of factually false information. In social science literature scholars sometimes make further distinctions among various forms of communication problems involving false or unverified information, such as rumors, gossips, hoax, conspiracy theories, urban legends and so forth.¹¹ In this Article, I use a generalized concept to highlight two aspects of their family resemblance. First, the relevant information in communication *can* be found, *ab*

¹¹ See e.g. Nicholas DiFonzo & Prashant Bortia, *Corporate Rumor Activity, Belief and Accuracy*, 28 PUBLIC RELATIONS REVIEW 2, 13 (2002).

initio or *post hoc*, as factually false, but is presented in the communication process as true.¹² Second, such false information's origination, dissemination, and impact all have to do with certain underlying networked structures, referring to not only the relevant interpersonal social networks and the Internet, but also networks of organized social, economic and/or political interests. These two aspects lay out premises for discussions of legal regulation in this Article. With its topical problem so defined, this Article's focus is not placed on considering such related issues as biased reporting, ideologically-driven news commentaries, and satirical fake journalism.

Below Part II offers an overview of the networked nature of the falsehoods problem and the primary paradigms of legal regulation that are typically applicable in this context. Part III identifies and critically reviews concerns most often raised in free speech discourses over the legal regulation of networked falsehoods. Part IV is a case study on China's experiences in tackling networked falsehoods through legal regulation, and its objective is to examine and understand the operational logic and effects of the different regulatory approaches in a context where they are practically and often quite aggressively deployed. Part V draws on contemporary theoretical discussions in Cyberlaw and free speech to consider implications of the China case on legal regulation of networked falsehoods in more general contexts. A brief conclusion follows Part V.

¹² Similar working definition, see David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, 10 J. INTERNET L. 1, 6 (2017) (defining "fake news" as the online publication of intentionally or knowingly false statements of fact); Clea Simon, *Fake News is Giving Reality A Run For Its Money*, HARVARD GAZETTE (Mar. 27, 2017), <http://news.harvard.edu/gazette/story/2017/03/harvard-panelists-discuss-future-of-journalism-in-fake-news-world/> (Jonathan Zittrain, as on the panel, proposing a similar definition).

II. NETWORKED FALSEHOODS: FACTS AND THE LAW

A. *An Old Problem Reincarnated*

This Section further explains what “networked” means as it modifies “falsehoods” in this Article. While the term connotes intuitively the Internet, here I use it also to underscore the embeddedness of the falsehood problem in interpersonal communication networks as well as networks of commercial and political interests.

1. Falsehoods in interpersonal social networks

The Internet over the past decades has become the medium for the dissemination and exchange of virtually all information. However, people living prior to the world of “Pizzagate,”¹³ or to the Internet itself, were no strangers to networked falsehoods.¹⁴ Till the 1980s and the 1990s, famous examples of bizarre and widespread false rumors, such as those about the Satanic affiliation of Proctor & Gamble,¹⁵ the financial support to the Ku Klux Klan by Snapples,¹⁶ and the sterilization effect of the fruit punch Tropical Fantasy on African American men,¹⁷ involved communicative vehicles no

¹³ See e.g. Marc Fisher et al., *Pizzagate: From Rumor, To Hashtag, To Gunfire In D.C.*, WASH. PO. (Dec. 6, 2017), https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html

¹⁴ Robert Darnton, *The True History of Fake News*, NYR Daily (Feb. 13, 2017), <http://www.nybooks.com/daily/2017/02/13/the-true-history-of-fake-news/>.

¹⁵ See e.g. FREDERICK KOENIG, RUMOR IN THE MARKETPLACE: THE SOCIAL PSYCHOLOGY OF COMMERCIAL HEARSAY 1 (1985); JEAN-NOEL KAPFERER, RUMORS: USES, INTERPRETATIONS, AND IMAGES ix (1990); ALLAN, J. KIMMEL, RUMORS AND RUMOR CONTROL: A MANAGER’S GUIDE TO UNDERSTANDING AND COMBATting RUMORS 4-15 (2004)

¹⁶ KIMMEL, *SUPRA* NOTE 15 at 39.

¹⁷ NICHOLAS DiFONZO AND PRASHANT BORDIA, RUMOR PSYCHOLOGY: SOCIAL AND ORGANIZATIONAL APPROACHES 2 (2007).

more “high tech” than pamphlets, printed ads, televised commercials, phone calls, text messages or face-to-face conversations.

Psychologists and sociologists since as early as the 1940s have taken to study a range of human communication phenomena related to pre-Internet falsehoods.¹⁸ The scholarly interests arose not only from the intrinsic curious nature but also the significant practical impact of associated problems. In times of war, for example, intentional or inadvertent false rumors contributed to military advantage or disadvantage; political and social unrest, in various circumstances, were found as instigated with or by false reports;¹⁹ in commercial settings, damaging hoaxes about product quality are often found to cause real loss in sales and general reputation to business.²⁰

What’s worth emphasizing here is that pre-Internet falsehoods are in essence no less “networked” than the problem’s reincarnation we confront today: As research findings from social psychology, social network theories, communication and marketing studies reveal, the origination, dissemination and harmful impacts of falsehoods all are deeply embedded in interpersonal social networks.²¹ For one thing,

¹⁸ E.g. R.H. Knapp, *A Psychology of Rumor*, 8 *Public Opinion Quarterly* 22 (1944); GORDON W. ALLPORT & LEO POSTMAN, *THE PSYCHOLOGY OF RUMOR* (1947).

¹⁹ KAPFERER, *SUPRA* NOTE 15 at 215-26.

²⁰ The Tropical Fantasy fruit punch, accused of containing a substance that cause sterility of African American men, is reported to have suffered a 70% loss of sales. *See supra* note 17.

²¹ Gina Lai & Odalia Wong, *The Tie Effect on Information Dissemination: The Spread of a Commercial Rumor in Hong Kong*, 24 *SOCIAL NETWORKS* 49 (2002); Eugenia Roldán Vera and Thomas Schupp, *Network Analysis in Comparative Social Sciences*, 42 *COMPARATIVE EDUCATION* 413 (2006) (“every flow of information over a geographical or social space takes place through concrete networks, and the characteristics of these networks affect the flow of information itself.”); Bradley S.

while false information is often initially fabricated and propagated by strategic actors out of self-profiting motives, the mere presence of such strategic propagators is not adequate for any falsehoods to achieve noteworthy dissemination. Instead, a much greater number of individuals, driven by “fact-finding,” “anxiety-relieving,” “relationship enhancing” or other socially oriented motives,²² need participate in the falsehood dissemination process so as to bridge gaps between otherwise clustered social networks, or to carry the transmission across tipping points to initiate full network cascades.²³ For another thing, the harmful consequences falsehoods tend to cause are highly dependent on characters of the underlying social networks. To the extent false information influences people’s cognition and behaviors to cause harmful consequences, the magnitude of the impact correlates with a range of network-level variables, including the underlying social groups’ preexisting shared attitudes, values and biases,²⁴ epistemic norms,²⁵ level of trust for formal sources of information,²⁶

Greenberg, *Diffusion of News of the Kennedy Assassination*, 28 PUBLIC OPINION QUARTERLY 225(1964).

²² Prashant Bordia & Nicholas DiFonzo, *Problem Solving in Social Interactions on the Internet: Rumor as Social Cognition*, 67 SOCIAL PSYCHOLOGY QUARTERLY 33 (2004).

²³ A “tipping point” refers to a certain stage in a diffusion process after reaching which the diffusion would take off abruptly to eventually reach all parts of the network system. See CHARLES KADUSHIN, UNDERSTANDING SOCIAL NETWORKS 153-54 (2012).

²⁴ Nicholas DiFonzo, *Rumour Research Can Rouse Digital Wildfires*, NATURE (Jan 8, 2013), <http://www.nature.com/news/rumour-research-can-douse-digital-wildfires-1.12167>. GARY ALAN FINE & PATRICIA A. TURNER, WHISPERS ON THE COLOR LINE: RUMOR AND RACE IN AMERICA 126-27 (2001) (analyzing the credibility among the African-American community of rumors, often about white anti-black conspiracies)

²⁵ DiFONZO & BORDIA, *SUPRA* NOTE 17 AT 174; Buckner, *A Theory of Rumor Transmission*, 29 PUBLIC OPINION QUARTERLY 54 (1965).

²⁶ DiFONZO & BORDIA, *SUPRA* NOTE 17 AT 241.

and the temporal collective emotion.²⁷

The proliferation of the Internet and social media, albeit otherwise alleged in popular discourse, has not “changed everything.” Many communication studies have instead found the psychological and structural aspects of online networks and associated human behaviors resemble, in fundamental ways, those in the offline world.²⁸ For example, while the Internet has now made our “small world” even “smaller,”²⁹ factors such as geographical locations as well as “homophily” make gaps and holes between different social clusters continue to exist in online networks.³⁰ Moreover, while every individual node is now seemingly more empowered in terms of making effective dissemination, the disparity of connectedness in scale-free networks continues to be stark, with the importance of well-connected supernodes in the diffusion of information and influences increasing rather than declining. In addition, while many social media and social networking sites have often combined the use of weak-tie and strong-tie networks to enhance both dissemination and influence, user behaviors on different online platforms continue to diverge according to their perceived tie strengths in different contexts.³¹

²⁷ *Id.* AT 170.

²⁸ For example, geographical distance and number of direct flights between the locations of two nodes turn out to highly correlate with their ties on Twitter. Takhteyev, Gruzd & Wellman, *Geography of Twitter Networks*, 34 SOCIAL NETWORKS 73-81 (2012). KADUSHIN, *SUPRA* NOTE 23 at 4 (quoting Boase et. al. that “internet fits seamlessly with in-person and phone encounters... The more that people see each other in person and talk on the phone, the more they use the internet.”).

²⁹ Dodds, Muhamad & Watts, *An Experimental Study of Search in Global Social Networks*, 301 SCIENCE 827 (2003).

³⁰ Ugander, Karrer, Backstrom & Marlow, *The Anatomy of the Facebook Social Graph*, working paper (2001), <http://arxiv.org/abs/1111.4503>.

³¹ For example, Yuqiong Zhou’s study in early 2000s found that although the Internet

In other words, the falsehoods problems on the Internet remain highly embedded in interpersonal communication networks. As one approaches networked falsehoods today, therefore, insights accumulated from social science research, including those from the pre-Internet age, are still relevant and informative, in particular where such research may shed light on the structural and psychological characteristics of the underlying interpersonal social networks. Indeed, as previously noted, contemporary writings for legal audiences, such as those of Sunstein, draw heavily from these insights on network structures and psychology.³²

2. Falsehoods in networks of organized interests

While the rise of the Internet has not reduced the embeddedness of falsehoods in interpersonal social networks, it has considerably fostered a stronger bond between the dissemination of falsehoods and organized networks of commercial and/or political interests. In other words, falsehoods are today “networked” in the sense that their origination and dissemination are increasingly the result of coordinated and even organizational efforts that are critically facilitated by Internet-based media and communication tools.

To many in the United States, the presence of organized interest networks behind

was then already popularized in China, the more a rumor may affect specific decision making and behavior of people, the more likely it would still be transmitted through cell phone text messages within strong-tie networks. Yuqiong Zhou (周玉琼), Zhenshi de Huangyan: Dizhi Jialefu Shijian de Xin Meiti Yaoyan Fenxi (真实的谎言：抵制家乐福事件的新媒体谣言分析)[*True Lies: An Analysis of New Media Rumors Regarding “Anti-Carrefour” Event*], Chuanbo yu Shehui Xuekan (传播与社会学刊) [THE CHINESE JOURNAL OF COMMUNICATION AND SOCIETY], no.9, 2009, at 10 .

³² SEE GENERALLY SUPRA NOTE 3.

online falsehoods must now seem obvious post the 2016 Presidential Election. Prior to the accusations about “election meddling” against the Russian government,³³ the Macedonian teenagers,³⁴ and Cambridge Analytica,³⁵ however, organized interests were rarely the focus of most studies on networked falsehoods. For social scientists, such choice is more than reasonable: By all means, it is never surprising or difficult to understand that some actors in the human society will have strategic, self-profiting motives to produce false information in order to manipulate and deceive others. In the frequently studied case of Procter & Gamble’s Satanist rumor, for example, it was easy to see why the Amway distribution networks, a competitor to P&G, would have at one point been involved in propagating the rumor.³⁶ But for social scientists, the case is interesting obviously because a much broader set of factors need be investigated for how they contributed to the rumor’s persistence through so many cycles and all those many years. In other words, to study the mechanisms of how falsehoods bring about negative consequences is more important as a matter of science than to study the harms themselves.³⁷

³³ *Russia, U.S. Elections, and the Fake News Cycle*, SNOPE.COM (Apr. 18, 2017) <http://www.snopes.com/2017/04/18/russia-us-fake-news/>

³⁴ Samantha Subramanian, *Inside the Macedonian Fake-News Complex*, WIRED (Feb. 15, 2017), <https://www.wired.com/2017/02/veles-macedonia-fake-news/>.

³⁵ Adam Taylor, *Cambridge Analytica’s Reach Went Far Beyond the U.S. Elections*, WASH. PO. (Mar. 21), https://www.washingtonpost.com/news/worldviews/wp/2018/03/20/cambridge-analyticas-reach-went-far-beyond-the-u-s-elections/?utm_term=.ad5cef313ef2.

³⁶ Randy Haugen, who played an instrumental role in propagating the Satanist affiliation rumor and was sued with three other distributors by P&G, was a “diamond” in the Amway system having up to 100,000 “downlines.” See *Procter & Gamble Co. v. Haugen*, 2008 WL 3192137 (D.Utah Aug. 06, 2008).

³⁷ ZHOU YUQIONG (周玉琼), *Dangdai Zhongguo Shehui de Wangluo Yaoyan Yanjiu* (当代中国社会的网络谣言研究) [STUDIES ON INTERNET RUMORS IN CONTEMPORARY CHINESE SOCIETY] (2012) at 58.

In today's communication environment centered upon the Internet and social media, however, there are strong policy reasons for paying greater attention to the role organized interest networks play in propagating falsehoods. Investigations in current context have revealed, for example, that hyper-partisan networks of internet media now play a significant role in electoral politics in the United States by spreading networked falsehoods through sophisticated technologies and organizational mechanisms.³⁸ Yet at a more general level, thanks to the rise of the commercial Internet over the past two decades, market-based incentives to manipulate and deceit through falsehoods propagation have generally become stronger and more prevalent, such manipulative and deceptive operations more effective, and these two trends mutually reinforcing.

Through this day, the commercial Internet has primarily fed on eyeballs,³⁹ and incentives inherent to business models built upon this basic law are to produce whatever moves user traffics and drives up clicks.⁴⁰ More specifically, as economists Hunt Allcott and Matthew Gentzkow theorize, propagators are incentivized to produce fake news because people's psychological utility from consuming the same drives demand, and because the cost of production and propagation is incredibly low on the Internet and social media.⁴¹ Thanks to the social and psychological features of human

³⁸ Yochai Benkler et al., *Breitbart-led Right-Wing Media Ecosystem Altered Broader Media Agenda*, COLUM. JOURNALISM REV. (Mar. 3, 2017), <http://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php>. Also see Nathan Persily, *Can Democracy Survive the Internet*, 8 J. DEMOCRACY 63 (2017).

³⁹ SEE GENERALLY TIM WU, *THE ATTENTION MERCHANTS* (2016), and in particular Part V.

⁴⁰ Ethan Zuckerman, *The Internet's Original Sin*, THE ATLANTIC (Aug 14, 2014), <https://www.theatlantic.com/technology/archive/2014/08/advertising-is-the-internets-original-sin/376041/>

⁴¹ Hunter Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016*

communication networks, hoaxes, rumors, conspiracy theories, urban legends, fake news and the like have proven to be good material marketers can leverage to create viral dissemination.⁴²

More importantly, on the supply side, the Internet empowers motivated falsehoods propagators in critical ways. First and most intuitively, the Internet and data technologies provide various tools for propagators to not only expand but also target their audience with unprecedented efficacy.⁴³ Second, and even more profoundly, the Internet facilitates the formation and mobilization of propagation networks that can act in highly coordinated manner. As illustrated quite vividly by the tale of Macedonian teenagers, gossips and trolling are no longer “idle” pursuits but serious paying jobs for an average internet user in a cyber economy.⁴⁴ With the Internet’s capacity to easily assemble massive cheap electronic labors from across the globe, political and commercial interest groups today can much more easily and reliably engineer cascades in information and influence diffusion today.⁴⁵ Moreover, the trend in using social bots

Election, 31 J. ECON. PERSPECTIVE 211, 218 (2017).

⁴² A recently reported, very telling example of how appealing false stories may be, see Craig Silverman, *This Fake News Site Owner Says He Got 1 Million Views In Just Over A Week*, BUZZFEED (Mar. 3, 2017),

https://www.buzzfeed.com/craigsilverman/this-website-just-showed-its-still-super-easy-is-to-get-traf?utm_term=.sn15aR0oAw#.ycPRZp8W02 ; Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News On Facebook*, BUZZFEED (Nov. 17, 2016),

https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.anzJLop7q#.fxQ1AreDP (reporting that in the final three months of the 2016 election top-performing fake election news stories on Facebook generated more engagement than top stories from mainstream news media outlets.)

⁴³ WU, *SUPRA* NOTE 39 AT 318-327.

⁴⁴ See *supra* note 34.

⁴⁵ This applies to other forms of cyber law problems too, such as cyber stalking, where the easiness of recruiting strangers and formation of hate groups is significant

and artificial intelligence suggests that the operation of large-scale propagation networks will simply become even more economized in the future.⁴⁶

In sum, as cyberlaw theorists have long foretold, the “generative internet” is powerfully generative of not only good but vice;⁴⁷ the massive quantity of intentionally fabricated false information is surely more than illustrative of that point. While in the past random pranksters were from time to time found as standing on the ground zero of influential falsehoods, today prominent incidents of internet falsehoods, not surprisingly, are often the product of sophisticated political and commercial marketing campaigns by organized interest networks.

B. Paradigms of Legal Regulation

If networked falsehoods pose challenges to the human society, are laws and regulations responsive to the problems, and how well do they respond? In most jurisdictions, not surprisingly, one does not find a centralized body of “law of the horse”⁴⁸ on networked falsehoods. Nonetheless, most countries do have in place a range of potentially applicable legal and regulatory institutions. Traditionally, these laws and regulations are considered as each operating within a range of separate

character to cyber harassment. *See* DANIELLE KEATS CITRON, HATE CRIME IN CYBER SPACE 5, 61-62 (2014)

⁴⁶ Alessandro Bessi & Emilio Fer, *Social Bots Distort the 2016 U.S. Presidential Election Online Discussion*, 21 FIRST MONDAY (Nov. 2016), <http://journals.uic.edu/ojs/index.php/fm/article/view/7090/5653>.

⁴⁷ Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 2003-13 (2006); LESSIG, *SUPRA* NOTE 9 AT 74-76.

⁴⁸ Frank Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 208 (1996).

institutional jurisdictions.

This Section maps the variety of laws into three general paradigms: rules for speaker liabilities, information censorship system, and counter information operations. A society's possible regulatory response to networked falsehoods would typically consist of these three paradigmatic approaches. In the following, I first illustrate the three paradigms through a brief overview of the relevant U.S. laws and regulations.

1. Laws for speaker liabilities (“liability laws”)

Liability laws, including those under civil, administrative and criminal laws, are the very basic vehicle for sanctioning against and therefore deterring individual persons and entities from fabricating and propagating harmful false information. In modern times, the strong U.S. constitutional norms protecting free speech has significantly marginalized the use of criminal sanctions. False speech on political affairs, for example, is generally beyond the reach of criminal law (or any law, for that matter).⁴⁹ State criminal libel statutes, where reserved on the book, are very infrequently used in practice.⁵⁰ Similarly shelved are state bank run laws that purported to penalize false and derogatory statements or rumors about the financial condition or solvency of

⁴⁹ See texts accompanying *infra* notes 84-5.

⁵⁰ Criminal libel statutes, which could be most intuitively used to penalize false commercial rumors, have been repealed in most states after *Sullivan* and subsequent first amendment decisions of the Supreme Court. In the 16 states and territories that still have such statutes on the book, they are rarely used and, “when they are, the triviality of the alleged offenses often leads to dismissals or calls for repealing the laws.” Wagner and Fargo, *Criminal Libel in the United States, A Report for the International Press Institute*, 29, http://www.freemedia.at/fileadmin/media/IPI_Report_on_Criminal_Libel_in_the_United_States.pdf.

banking institutions.⁵¹ The chance a falsehood propagator gets prosecuted for criminal offenses is perhaps substantial only where his or her behavior is specifically linked to concrete commercial frauds, such as consumer good or securities frauds.⁵²

Although American law typically frowns upon the thought of criminalization as being draconian, a range of public regulatory agencies, including but not limited to the Federal Trade Commission (the “FTC”), the Food and Drug Agency (the “FDA”), the Federal Communication Commission (the “FCC”) and the Securities and Exchange Commission (the “SEC”),⁵³ often have authority to impose lesser administrative sanctions on propagators of falsehoods within their respective agency jurisdiction. For example, the FTC may bring enforcement actions to impose fines, injunctions and compulsory refunds against “unfair or deceptive acts or practices”⁵⁴ that involve the

⁵¹ See e.g. N.Y. BNK. LAW § 671 (“Any person who willfully and knowingly makes, circulates or transmits to another or others any statement or rumor, written, printed or by word of mouth, which is untrue in fact and is directly or by inference derogatory to the financial condition or effects the solvency or financial standing of any bank, private banker, savings bank, banking association, building and loan association or trust company doing business in this state, or who knowingly counsels, aids, procures or induces another to start, transmit or circulate any such statement or rumor, is guilty of a misdemeanor.”). Other modern examples of bank libel laws, see TEX. REV. CIV. STAT. ANN. art. 342-907 (West 1973); N.D. CENT. CODE § 6-08-15 (1987); ALA. CODE § 5-5A-46 (1981); KY. REV. STAT. ANN. § 434.310 (1990). California used to have a similar statute until being struck down on constitutional ground in the state court in 2012.

⁵² For example, in the well-known Emulex case, a short seller was charged for both civil and criminal violations for disseminating a false press release about Emulex, which caused an over 50% drop in Emulex’s stock price instantly after publication, allowing the short seller to cover his previously built short position with a profit. See *SEC v. Jakob*, Litigation Release No. 16671, 73 SEC Docket 415 (Aug. 31, 2000), 2000 WL 1232989.

⁵³ Although in some cases the FDA was found in short of power to throw punishment on rumor originators, some argues that it also has the potential to engage in more aggressive enforcement with its power to punish conduct such as misbranding. See Karen Daly, *Internet Hoax: Public Regulation and Private Remedies*, 25, 27 (unpublished paper 2000), <http://dash.harvard.edu/handle/1/8965617>.

⁵⁴ 15 U.S.C. § 45, 52-55.

dissemination of misleading claims about food, drugs, medical devices, healthcare services, or cosmetics.⁵⁵ The FCC has statutory authority to impose fines on broadcast networks for transmitting false distress signals.⁵⁶ The SEC, in protecting investors from abusive and manipulative short selling practices, has the discretion to take administrative and civil actions against abusive rumormongers.⁵⁷

Allowing private parties to recover damages for harms is another intuitive way in which the law intervenes in networked falsehoods. Liabilities for monetary damages, as compared with criminal penalties are expected to achieve not only deterrence but also corrective justice. The U.S. law technically offers a full menu of different civil claims one may file in court against falsehoods propagators.⁵⁸ For example, in perhaps the most comprehensive and extensive legal warfare against false rumors in the history of U.S. law, P&G's legal team may have exhausted all possible causes of civil actions, ranging from defamation, common-law unfair competition, violations of the Lanham Act, business disparagement, tortious interference with economic relations, fraud, civil

⁵⁵ 15 U.S.C. § 52-55.

⁵⁶ The Commission's prohibition against the broadcast of hoaxes is set forth in Section 73.1217 of the Commission's rules, 47 C.F.R. § 73.1217, <https://www.fcc.gov/reports-research/guides/hoaxes>. The provision is rarely invoked by FCC, however. Eugene Volokh, *Fake News and the Law, from 1798 to Now*, WASH. PO.: VOLOKH CONSPIRACY (Dec. 9, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/09/fake-news-and-the-law-from-1798-to-now/>.

⁵⁷ Sections 9 and 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 and Section 17(a) of the Securities Act of 1933 prohibit market manipulation and false statements in connection with the purchase or sale of a security. Further, on the securities market, powerful market self-regulatory bodies, such as FINRA and major stock exchanges, also exercise authorities to sanction falsehoods propagators with their own reach. *See e.g.* NYSE Rule 435(5); FINRA Rule 2010; FINRA Rule 6140(e).

⁵⁸ Bruce P. Smith, *Cybersmearing and the Problem of Anonymous Online Speech*, 18-FALL Comm. Law. 3 (2000); Klein & Wueller, *supra* note 12.

conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), and claims under various other state statutes.⁵⁹

Despite the apparent abundance of options, however, all types of civil claims are not equally effective when pursued in the U.S. courts. Still in the P&G case, competition law claims under the amended Lanham Act appears to provide a more promising avenue for business plaintiffs seeking remedies for commercial falsehoods; defamation-based claims, in contrast, were met with formidable roadblocks instituted primarily by the first amendment jurisprudence.⁶⁰ More generally, since the U.S. Supreme Court's opinion in *New York Times v. Sullivan*, the constitutionalization of defamation has effectively eliminated the traditional, plaintiff-friendly strict liability regime;⁶¹ all plaintiffs subsequently are required to prove some level of fault on the part of defendants regarding falsity, with public figure plaintiffs facing the most formidable challenge of proving actual malice.⁶² State anti-SLAPP (i.e. Strategic Lawsuits Against Public Participation) statutes and similar judicially imposed hurdles⁶³ also have rendered it difficult for plaintiffs to use previously available "John Doe" proceedings

⁵⁹ A thorough review of types of civil liabilities applicable, *see* Klein & Wueller, *supra* note 12 at 7-9.

⁶⁰ *See supra* note 36.

⁶¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 at 349 (1974). Some jurisdictions such as New York requires greater than negligence for private figure defamation.

⁶² *Id.*

⁶³ Arizona Court of Appeals, for example, requires that the party seeking discovery of the identity of an anonymous speaker show that (1) the speaker has been given adequate notice and a reasonable opportunity to respond to the discovery request, (2) the requesting party's cause of action could survive a motion for summary judgment on the elements of the claim not dependent on the identity of the anonymous speaker, and (3) a balance of the parties' competing interests favors disclosure. *Mobilisa v. Doe*, 217 Ariz. 103, 114-15 (App. 2007).

to sue anonymous or pseudonymous falsehoods propagators on the Internet.

2. Information censorship system (“censorship”)

By “censorship” I refer first to a range of public regulatory tools that the government and legal authorities may use to prevent or limit public access to false information. Such tools include, but not limited to, court-issued injunctions or restraining orders against publication, administrative licensing regimes, human and/or automated content blocking and filtering systems, post-publication takedown requirements and other measures in similar forms and nature.⁶⁴ Prior-restraint types of government censorship over media and press, such as licensing and screening requirements, are unconstitutional in the United States.⁶⁵ Infrequently, where false information is believed as perhaps causing irreparable harms, the court may consider issuing injunctions against publication. In a quite unusual case, for example, a federal district court once agreed that the famous corporate credit information gatherer Dun & Bradstreet should be restrained from releasing a report on the plaintiff that contains false and damaging information about the latter’s financial condition.⁶⁶ Besides, regulatory agencies also have the power to prohibit within their respective jurisdictions the dissemination of false and misleading information, which essentially function as prior restraints.⁶⁷

⁶⁴ More internet-oriented definition, *see* BARNEY WHARF, GLOBAL GEOGRAPHIES OF THE INTERNET 47 (2013).

⁶⁵ *New York Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 714 (1971).

⁶⁶ *Towers Financial Corp. v. Dun & Bradstreet, Inc.*, 803 F. Supp. 820 (S.D.N.Y.1992).

⁶⁷ *See* text accompanying *supra* notes 56-7.

Moreover, in this Article, I include in the category “censorship” those legal regimes relating to liabilities imposed on the publisher, as opposed to the speaker, of certain messages.⁶⁸ Traditionally, under the common law, a publisher of a false statement by another has the same exposure as the speaker. Such laws are obviously meant to incentivize publishers to exercise reasonable editorial control over the information it publishes, in the form of conducting both *ex ante* screening and *ex post* retraction; this in a sense is equivalent to legal requirements for instituting censors at the publishers’ level.

Modern U.S. law, however, has rendered finding publisher liabilities more difficult.⁶⁹ In particular, with respect to internet media, under Section 230 of the Communication Decency Act of 1996, Internet Service Providers (“ISPs”) are generally exempt from publisher liability for content not created or developed by themselves.⁷⁰ Accordingly, websites and platforms ranging from Google, Facebook, and Yahoo! to Yelp, Reddit and 4chan in most cases do not have to worry about legal liabilities over false information posted by their users. This means that these intermediaries, occupying the central place in today’s communications environment,

⁶⁸ Nevertheless, the latter regime in legal discourses is also often referred to as “censorship” for its effect of encouraging self-censorship.

⁶⁹ The Sullivan case, as Rebecca Tushnet argues, is also an intermediary liability case; there the court worries that denying protection for NYT in the case “... would discourage newspapers from carrying “editorial advertisements” of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities ...” See Rebecca Tushnet, *Power without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 101, 120-22 (2008).

⁷⁰ *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

are not legally required in most cases⁷¹ to take editorial actions, whether takedowns, retractions or corrections, even when they know networked falsehoods are being circulated with tools they provide.

That said, internet censorship implemented by the government directly or indirectly through intermediaries is far from non-existent in the United States. Under the carve-outs of Section 230, the U.S. Congress has, in contexts ranging from child pornography, intellectual property to anti-terrorism, imposed legal requirements for ISPs to block and filter certain contents.⁷² Legal scholars such as Jack Balkin and Derek Bambauer in recent years have also called attention to a range of indirect and tacit techniques the U.S. regulators deploy to incentivize censorship by intermediaries.⁷³ Suppose future legislation determines to switch gear on regulating networked falsehoods, there are readily adaptable infrastructure and tools that can migrate from those other contexts.

3. Counter information operations (“counter information”)

To contain the impact of networked falsehoods, authorities may produce and propagate corrective and rebuttal information in different forms and through different channels. This regulatory approach is here generally referred to as “counter information.”

Compared with liability rules and censorship, regulation through counter

⁷¹ 47 U.S.C. § 230(e)(2).

⁷² See e.g. Children’s Internet Protection Act.

⁷³ Derek E. Bambauer, *Orwell’s Armchair*, 79 U. CHI. L. REV. 863 (2012); Jack Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296 (2014).

information appears lighter-touched. In addition to being subject to the general government transparency requirements, U.S. federal and state government authorities typically keep in place dedicated, in-house rumor monitoring and control capacities,⁷⁴ and they take responsive information-based measures in concrete incidents of networked falsehoods. As one most notable example, in responding to the never-ending false consumer product rumors, the FDA long establishes the practice of using its own websites and publications to disseminate information aimed at dispelling the specific rumors.⁷⁵ Such responsive counter information practices are generally not complained about with respect to its legality. The challenge constantly posed by dynamics of today's networked falsehoods problem, instead, is about whether the government information can be effectively responsive.

In addition, governments may also use counter information in proactive fashions. For example, in the national security context, the U.S. government reportedly has deployed communication specialists to jihadist-infested online forums in order to insert “moderating” information against the influence of anti-American conspiracy theories.⁷⁶ As a general matter, American free speech jurisprudence acknowledges the legitimacy of the government adding its own voice to the marketplace of ideas.⁷⁷ But given the historical and contemporary concerns over the government propaganda, domestic

⁷⁴ See e.g. Rumor Control: FEMA Disaster Assistance Concerns Answered, FEMA website (Nov. 7, 2016), <https://www.fema.gov/news-release/2016/11/07/rumor-control-fema-disaster-assistance-concerns-answered-1>.

⁷⁵ See 21 U.S.C.A. §375(b). See Daly, *supra* note 53.

⁷⁶ Sunstein & Vermeule, *supra* note 6.

⁷⁷ Lawrence Tribe, American Constitutional Law §12-4, at 590 (1978) (government may add its voice to the others it must tolerate as long as it does not drown them out).

information operations are often controversial and are long met with skepticism from the public and the legislature.⁷⁸ Till 2013, the Smith-Mundt Act had officially prohibited broadcast programs funded by the U.S. government, such as Voice of America, Radio Free Asia, and so forth, from being delivered to the domestic audience.⁷⁹ With such law being repealed in 2013, the U.S. government may now consider using these channels to disseminate counter information against networked falsehoods among certain domestic communities.⁸⁰ But as compared with broadcasting, it is the Internet that will most likely be the focus of the government's future counter information strategy against networked falsehoods. On top of using of its own websites, over the past decade, the U.S. government has been observed to lead the trend of making social media an integral part of its strategy to "engage and connect" with citizens.⁸¹

4. Summary

The foregoing brief overview of the U.S. laws and regulations is not meant to be comprehensive or detailed. My objective, as noted, is to illustrate one pattern in which

⁷⁸ For a late example, in 2005, the Federal Propaganda Prohibition Act of 2005 was introduced in the House amid controversies as the media reports on the Bush administrations' information operatives. Stanislav Getmanenko, *Freedom from the Press: Why the Federal Propaganda Prohibition Act of 2005 Is A Good Idea*, 114 PENN ST. L. REV. 251, 271 (2009)

⁷⁹ Smith-Mundt Act, Pub. L. No. 80-402, 62 Stat. 6 (1948) (codified as reenacted at 10 U.S.C. § 2241a (2006))

⁸⁰ Such as the Somalian community. See John Hudson, *U.S. Repeals Propaganda Ban, Spreads Government-Made News to Americans*, FOREIGN POLICY (Jul. 14, 2013), <http://foreignpolicy.com/2013/07/14/u-s-repeals-propaganda-ban-spreads-government-made-news-to-americans/>

⁸¹ Arthur Mickoleit, *Social Media Use by Government: A Policy Primer to Discuss Trends, Identify Policy Opportunities and Guide Decision Makes*, OECD Working Papers on Public Governance, No. 26, p.12, http://www.keepeek.com/Digital-Asset-Management/oecd/governance/social-media-use-by-governments_5jxrcmghmk0s-en#page1.

the three groups of regulatory institutions may be set up and used in a given jurisdiction. Moreover, although it is difficult to establish causal links, the foregoing overview supports a common impression: As a general matter, the U.S. law is not particularly heavy-handed on networked falsehoods, as in each of the three regulatory fronts legal interventions are constrained by free speech-related law and norms. An analysis of related free speech concerns is the subject of the next Part III.

III. FREE SPEECH CONCERNS ON REGULATING NETWORKED FALSEHOODS

A. *Absolutism versus Consequentialism?*

In the formal U.S. first amendment jurisprudence, false speech is typically given the “low value” status, and that in theory means legal regulation should pass constitutional muster relatively easily.⁸² But as a practical matter, American courts refuse to categorically exclude false speech from the protective coverage of the first amendment and often insist that regulation of false speech be placed under similarly exacting scrutiny to which content-based speech regulations are typically subject.⁸³ In the highly illustrative decision of *United States v. Alvarez* in 2012, the U.S. Supreme Court struck down the Stolen Valor Act of 2005, a statute criminalizing misrepresentations about military honor, on the basis that the statute banning non-

⁸² See e.g. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2171 (2015) (“In general, however, what unites the low-value categories is the fact that they can be regulated on the basis of their content without having to satisfy strict scrutiny.”)

⁸³ For example, both Washington’s and Minnesota’s laws banning false political speech have been challenged and found to be unconstitutional by different courts. See Staci Lieffring, *First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After United States v. Alvarez*, 97 MINN. L. REV. 1047, 1053-1057 (2013).

defamatory falsehoods failed to meet the standard of strict scrutiny.⁸⁴ In light of such stern stance taken by the highest tribunal of the land, it is not surprising that in late debates even pro-regulation lawyers hesitate to go any further than making such mild pleas as “fake news *may* not be protected speech.”⁸⁵ From the perspective of more principled free speech advocates, indeed, it is puzzling enough that such debates could even open up again; as Eugene Volokh suggests, American law’s history with the Sedition Act of 1798, the Sedition Act of 1918, McCarthyism and the like should have long had the case closed on regulating any speech, false or not, of political concerns.⁸⁶

This Article does not plan to systematically engage the more absolutist genre of free speech theories.⁸⁷ Despite being perhaps *the* school of thought that can plausibly explain such idiosyncratic American first amendment decisions as *Hustler* and *Alvarez*, free speech absolutism is not conducive to nuanced, realistic analysis about the evolving and dynamic relations between information and law. While the intellectual and practical influence of absolutism remains significant, suffice it to say here that genuinely dogmatic adherents are unlikely mainstream even among American jurists. As Erica Goldberg observes, for better or worse, certain kind of consequentialist balancing of harms and benefits may be inevitable in free speech law’s discourse and practices.⁸⁸

⁸⁴ See *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012) (plurality opinion).

⁸⁵ Noah Feldman, *supra* note 8.

⁸⁶ Volokh, *supra* note 56.

⁸⁷ A recent critical analysis of the origin and effects of free speech absolutism, see Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953 (2016)

⁸⁸ Erin Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 695-715 (2016).

While this Article generally adopts free speech consequentialism as its normative framework, it is important to note, however, that a consequentialist framework actually increases, rather than resolves, analytical challenges.⁸⁹ Consider, for example, a well-structured normative test once proposed by Judge Richard Posner, which requires that the evaluation of any speech regulation take into consideration (i) social benefits of the regulated speech, which equals the social loss that may result from the suppression of valuable information, (ii) immediate and future social costs/harms that can be caused by the speech, (iii) the likelihood that the regulated speech, if not regulated, will cause harm, and (iv) administrative costs associated with the regulation, including cost of legal errors and resulting loss from the chilling effect.⁹⁰

Never popular among free speech theorists, likely due to its utilitarian/law and economics slant and perceived risks of excessive judicial discretion,⁹¹ the Posner

⁸⁹ John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1506 (1975);

⁹⁰ The formal expression of the expanded Dennis formula is $V + E < P x L / (1 + i)^n$. Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 8 (1986). Posner subsequently further refined his model by proposing to (i) subdivide the harm of speech into both the future harm of speech, which should be discounted so as to translate into the legal rubric of “imminent harm”, and the speech’s offensiveness, representing the definitive cost upon the time such speech is made, and also to (ii) replace the legal error cost in his original model with the more general concept of administrative/regulatory enforcement cost. The formula is revised to suggest that the speech should be permitted only if $B \geq pH / (1 + d)^n + O - A$, where B represents the benefit of the suppressed speech, H the harm of the speech, p the probability of the harm being materialized, d the discount factor, O the immediate offensiveness and A the cost of administering the regulation. Further, using x to represent strictness of regulation, optimal regulation is found where $A_x + B_x = - [pH / (1 + d)^n + O] (x)$. POSNER, *FRONTIERS OF LEGAL THEORY* 69-71 (2004).

⁹¹ Cf. THOMAS SCANLON, *A THEORY OF FREEDOM OF EXPRESSION* 534 (1972) (discussing the particular dangers when government is asked to balance interests in cases in which their political issues are involved: “governments are notoriously partisan and unreliable”).

formula has virtue of not only simplicity but also inclusiveness: Almost all sorts of non-absolutist/consequentialist interests potentially relevant to speech regulation, including intangibles and non-quantifiables, can be conceivably accounted for in this framework via one or more entries to the cost or benefit ledgers. But thanks to the difficulty, and sometimes impracticality, in identifying, quantifying and weighing many of the possible cost and benefit factors, the Posnerian framework, however streamlined it may look, has yet to produce any rigorous cost-benefit analysis. And more generally speaking, given such analytical uncertainties, even so-called consequentialist theorists are inclined to “play safe” on speech regulation and overwhelmingly reject “*ad hoc*” balancing in the free speech context. The practical differences between consequentialism and absolutism in American free speech discourses, therefore, are much smaller than presumed, because the shadow of the latter often looms quite large over the former.

In this Article, instead of attempting to solve wholesale the normative puzzle of how networked falsehoods may be best regulated, I propose that lawyers critically reflect, in the context of this increasingly prominent information problem, on the conventional free speech concerns that are often raised over and against legal regulation in specific and general. Intuitive analyses based on logics of legal institutions and insights from social science research, as presented in the following sections, could illuminate on questions inherent in the conventional discourses that call for reconsideration. These questions, through Part IV’s case study, will be further examined in a more contextualized fashion.

B. Free Speech Concerns: An Overview

1. Liability laws and excessive chilling effects

Free speech concerns over liability laws generally relate to their proposed deterrence, or “chilling effects” on speakers. More specifically, the worry lies in the prospect that potential sanctions under public and private laws may serve so strong a deterrent that people consequently err on the safe side of not making an even protected speech.⁹² As Daniel Farber phrases it, the problematic consequence of chilling effects is that the amount of total information disseminated in society may end up being “suboptimal.”⁹³

The chilling effects potentially resulting from regulating networked falsehoods are often attributed to the difficulty in perfectly define “falsehoods” in legal text and establish it in legal proceedings. These types of laws are easily made in vague or overbroad fashions, and as a result, can deter rational speakers from disseminating valuable messages that nevertheless contain information difficult to verify.⁹⁴ In the context of regulating networked falsehoods, however, there are reasons to question if liability laws necessarily create an intolerable chilling effect as often presumed in relevant discussions. The law’s deterrence effect, as a general matter, works in more complex ways than simple models suggest.⁹⁵ If we understand “chilling” to mean a

⁹² *Sullivan*, 376 U.S. at 271-72.

⁹³ Daniel A. Farber, Commentary, *Free Speech without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 568 (1991).

⁹⁴ Lee Goldman, *False Campaign Advertising and the ‘Actual Malice’ Standard*, 82 TUL. L. REV. 889, 917-18 (2008).

⁹⁵ Richard H. McAdams & Thomas S. Ulen, *Behavioral Criminal Law and Economics*, in 3 CRIMINAL LAW AND ECONOMICS: ENCYCLOPEDIA OF LAW AND

generalized deterrent effect on the average societal members as potential speakers, then that effect may be first undercut by the fact that most individuals, as participating in the dissemination process of falsehoods, are driven by their psychological and emotional needs as opposed to strategic motives. Legal deterrence, as behavioral research often predicts, could work less effectively on individuals who behave systematically different from a simplistically modeled rational actor.⁹⁶ Moreover, for the sheer sake of enforcement cost, it is never realistic for legal authorities to even technically impose liabilities so as to deter enough participants away from the falsehoods dissemination process. That explains, at least partially, why in most jurisdictions' liability laws, doctrinal and institutional safeguards, such as the requirement for proof of fault and sufficient reach of publication, are typically in place to allow almost all but the strategically motivated propagators to face very insignificant or infinitesimal chance of being prosecuted.

Nevertheless, liability laws, like other regulatory tools held by the government, may certainly be administered in biased rather than public interest-spirited fashions. In those situations, it is not difficult to imagine a particular sector of the society being over-chilled if they perceive the target of the government's selective enforcement to be their identity instead of particular information harms. Moreover, as social network studies generally uncover, most real-world communication networks are "scale-free,"

ECONOMICS 403, 413–26 (Nuno Garoupa ed., 2009).

⁹⁶ Alon Harel, *Behavioral Analysis of Criminal Law: A Survey*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (Eyal Zamir & Doron Teichman eds., 2014), CH.22.

and a minority of highly connected “supernodes” in relevant networks play disproportionately significant roles in effecting transmission of information and influence.⁹⁷ As falsehood propagators may mobilize supernodes to facilitate dissemination,⁹⁸ liability laws may opt to target supernodes too.⁹⁹ If liability laws are enforced with such a selective focus, the chilling of supernodes may cause less effective communication of not only harmful but also useful information.

2. Censorship and information loss

Censorship, understood in the sense of imposing prior restraints on information dissemination, is often disfavored as a regulatory approach compared with liability laws.¹⁰⁰ Liability laws operate in the *post hoc* fashion, and thus allows speech to be

⁹⁷ See DAVID WATTS, SIX DEGREES OF SEPARATION 104-107 (2003). Intuitively that is all obvious: A few people know a great many of other people while most of us know far fewer. It is in essence similar to the “80/20” distribution in Alfredo Pareto’s famous study of wealth distribution, which suggests that 80% of the wealth are concentrated in 20% of the population. See generally ALBERT-LASZLO BARABASI, LINKED: THE NEW SCIENCE OF NETWORKS 68-92 (2002).

⁹⁸ Marketers have long attempted to exploit the value of supernodes through involving celebrities and opinion leaders in publicity campaigns. EMANUEL ROSEN, THE ANATOMY OF BUZZ REVISITED 83-107 (2009). Opinion leaders have also been found to play significant roles in the dissemination of both the rumors and counter-messages. Amid the mad cow disease scare in 1998, Oprah Winfrey was famously sued in court by a group of Texan ranchers for allegedly causing the widespread dissemination of the false message that American beef has also been contaminated. When P&G tried to quell the Satanism rumor, they turned to church leaders that are influentials among their own communities. That said, if opinion leaders deviate too much from the accepted cognitive norm for verification, they may risk losing the privileged position in the network together with associated social capital. See KADUSHIN, *SUPRA* NOTE 23 AT 143 (2012).

⁹⁹ Wu Mei & Cao Chengyu (吴玫 曹乘瑜), Wang Luo Tui Shou Yun Zuo Jie Mi: Tiaozhan Hulian Wang Gonggong Kongjian (网络推手揭秘: 挑战互联网公共空间) [PUSHING HANDS VIRAL MARKETING ON CHINESE INTERNET] 28-29 (2011).

¹⁰⁰ The concept of “prior restraint” in U.S. constitutional law historically had much to do with general licensing and censor schemes for the press, but in contemporary context it is more likely to take the form of injunctions and restraining orders against particular speaker before making a communication. See Vincent Blasi, *Toward a*

made first and examined in open legal proceedings subsequently. Censorship, in contrast, aims to prevent the public from ever accessing certain contents, and as Balkin illustrates, it often tends to be deliberately overbroad, poses greater risks of manipulation and abuse given common opacities of blocking and filtering rules and decisions, and shifts much of the regulatory cost from authorities to speakers and publishers.¹⁰¹

But censorship in itself may appear less draconian than sanctions and liabilities on the person of individual speakers. Moreover, in dealing with the harmful impact of networked falsehoods, censorship could intervene in a more direct and likely efficacious manner: The diffusion of information and influence through social networks are often multi-staged with tipping points, and the process picks up momentum only after adopters of relevant information form such a critical mass that a cascade becomes self-sustaining.¹⁰² To the extent filtering and removal of false information take effect in time, there may be a greater chance for preventing a cascade and limiting the harmful consequences of networked falsehoods. Therefore, likely due to its potential efficacy, governments never abandon censorship as a tool of information regulation. In most jurisdictions, proactive censorship systems are administered or compelled by the government at least on certain legally defined harmful contents.¹⁰³ While the U.S. law provides nearly blanket immunity¹⁰⁴ to ISPs, other jurisdictions opt to impose indirect,

Theory of Prior Restraint: The Central Linkage, 66 MINN. L. REV. 11 (1981); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983).

¹⁰¹ Balkin, *supra* note 73 at 2316-18.

¹⁰² KADUSHIN, *SUPRA* NOTE 23 AT 153-54.

¹⁰³ Derek Bambauer, *Cybersieves*, 59 DUKE L. J. 377, 381-85 (2009).

¹⁰⁴ *Supra* note 71.

responsive censorship requirements on information platforms to police contents complained about for infringing private rights.¹⁰⁵

The consequentialist objection to censorship, therefore, is not about the practice *per se*, but about its risk of abuse and excess.¹⁰⁶ As Balkin describes, although the Internet supposedly renders meaningless censorship practices of the *Pentagon Papers* era, during which time publication channels were more concentrated and thus easily regulable, governments now co-opt private internet companies to practice more powerful and potentially excessive digital censorship.¹⁰⁷ In connection with harmful speech excepted from the Section 230 immunity (child pornography and copyright infringement), Rebecca Tushnet notes, for example, that intermediaries have tendencies to over-censor through access blocking, at the expense of user expressions of innocuous nature and positive utility.¹⁰⁸

Through a range of testing techniques, researchers have long sought to track the general scope and target of blocking and filtering practices undertaken by governments across the world, in particular in countries where such practices are prevalent.¹⁰⁹ These

¹⁰⁵ See e.g. U.K. Defamation Act 2013, c. 25 §13; The European Union Electronic Commerce Directive, art. 14(1).

¹⁰⁶ Balkin, *supra* note 73 at 2317-18.

¹⁰⁷ *Id.* at 2315.

¹⁰⁸ Tushnet, *supra* note 69 at 111-7. Kate Klonick also documented more recently that private platforms started practicing extensive moderation against hate speech that is otherwise legally protected. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. (forthcoming 2018).

¹⁰⁹ See e.g. Jonathan Zittrain & Benjamin Edelman, *Empirical Analysis of Filtering in China*, Berkman Center for Internet & Soc'y, Harv. L. Sch., <http://cyber.law.harvard.edu/filtering/china/>; Gary King, Jennifer Pan, and Margaret E Roberts, *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 107 AM. POL. SCI. REV. 1 (2013); David Bamman et al., *Censorship and Deletion Practices in Chinese Social Media*, 17 FIRST MONDAY (Mar.

research may help us gauge the cost of censorship, but only in limited ways. With respect to regulating networked falsehoods, for any information that's not falsehoods but is blocked or filtered as such, excessive loss of information may be registered. But how then are we to consider the plausible consequences when certain information is taken away from the total mix, besides the abstract loss from denial of free exchanges of information? Given the general skepticism about government being an arbiter of truth, it is worried that even truthful and valuable information could, in the name of regulating networked falsehoods, be suppressed systematically to favor incumbents and disadvantage dissents.¹¹⁰ Furthermore, in the Internet context, as censorship is often opposed to for it could potentially "break the internet," censorship practices targeting networked falsehoods may raise the concern of imposing too onerous a burden on the Internet's spontaneous growth and innovation.¹¹¹ These concerns, very much underlying American free speech discourse on internet regulation,¹¹² are surely plausible. But to the extent they both predict certain perverse consequences, in what way those risks materialize, and how grave they may become, are empirical matters that cannot be simply presumed without a check against the reality.

3. Counter information, rebuttal efficacy, and propaganda risks

Public supply of corrective information, compared with liability laws and

2012), <http://journals.uic.edu/ojs/index.php/fm/article/view/3943/3169>.

¹¹⁰ See e.g. Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1808 (1999).

¹¹¹ Kevin Werbach, *The Centripetal Network: How the Internet Holds Itself Together, and the Forces Tearing It Apart*, 42 U.C. DAVIS L. REV. 343, 367 (2008).

¹¹² See e.g. Anupam Chander & Uyên P. Lê, *Free Speech*, 100 IOWA L. REV. 501 (2015).

ensorship, is presumably less problematic a regulatory response from the free speech perspective. Especially where falsehoods of public concerns are in circulation, government authorities are likely a cost-effective debunker given their advantages in information and credibility. But government supply of corrective information is surely not without its own risks and perils. From time to time, governments in rumor control mode also face difficulties in collecting and disseminating corrective information in timely manners. Inadvertently or negligently, they could even disseminate erroneous “corrective” information, which in turn worsens the situation.¹¹³

More fundamentally, social science research finds that the relevant epistemological and behavioral problems to networked falsehoods run much deeper than the mere lack of truthful information. As political scientists have long observed, on political issues average voters could be rationally ignorant and susceptible to false beliefs even where truthful information is generally available.¹¹⁴ While individuals are more prone to false beliefs where corrective information is lacking, psychologists find that individuals can be influenced by unverified information they do not even believe as true but only consider as making some sense.¹¹⁵ As false information spreads through social networks, mechanisms of social influence, which often operate on factors other than the relevant information’s availability or veracity, also significantly

¹¹³ A case documented by R.H. Turner reveals that residents in Port Jervis, New Jersey did not act on rumors about the potential dam breach until when such rumors were spread by the fire department. *See* DIFONZO & BORDIA, *SUPRA* NOTE 17. *Also see* SUNSTEIN, *ON RUMORS*, *SUPRA* NOTE 5 AT 46-49.

¹¹⁴ ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 21 (2d. 2016).

¹¹⁵ DIFONZO & BORDIA, *SUPRA* NOTE 17 AT 118-19. ZHOU, *SUPRA* NOTE 37 AT 96 (similar findings in case study on AIDS rumor in China).

affects individuals' willingness to accept and disseminate such information.¹¹⁶ Furthermore, once formed, beliefs in falsehoods are observed as quite resistant to rebuttals due to individuals' common psychological tendency to discount new information inconsistent with prior belief ("confirmation bias"),¹¹⁷ and to recall affirmative information more easily than negation ("denial transparency").¹¹⁸ Relatedly, the "small world" model of the social network theories also suggests that since many people form clustered networks based on "homophily", those network structures function as "echo chambers" that could drive polarization and reinforce people's false beliefs.¹¹⁹ Taken together, the supply-side solution of government counter information are considerably limited by the reality of social psychology.

Besides the garden variety of rebuttals and corrections, governments as previously noted may deploy more aggressive counter information-based strategies. In parallel to

¹¹⁶ *SEE E.G.* CASS R. SUNSTEIN, ON RUMORS, *SUPRA* NOTE 5 (arguing that it is the psychological processes such as polarization and cascades that make the false rumor problem not only extremely damaging to legitimate social interest but also unlikely to get resolved if left with the marketplace of idea).

¹¹⁷ DIFONZO & BORDIA, *SUPRA* NOTE 17 AT 223. *See also* Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 *POL. BEHAV.* 303 (2010) (finding through four experiments that corrections frequently fail to reduce and even reinforce false factual beliefs held by individuals with contradictory predispositions); Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 *J. L. STUD.* 65 (2014) (modeling effect of rebuttal based on findings about confirmation bias and preexisting disposition).

¹¹⁸ *See* Tybout Calder & Sternthal, *Using Information Processing Theory to Design Marketing Strategies*, 18 *J. MARKETING RESEARCH* 73 (1981); Wegner, Coulton & Wenzlaff, *The Transparency of Denial: Briefing in the Debriefing Paradigm*, 49 *J. PERSONALITY & SOC. PSYCH.* 338 (1985).

¹¹⁹ *See e.g.* CASS R. SUNSTEIN, #REPUBLIC, *SUPRA* NOTE 5 AT 11. Recent empirical evidence on the formation of "echo chamber" networks and the resulting polarization, *see* Alessandro Bessi et al., *Users Polarization on Facebook and Youtube*, *PLOS ONE* 11 (8); Michela Del Vicario et al., *Mapping Social Dynamics on Facebook: The Brexit debate*, 50 *SOCIAL NETWORKS* 6 (2017).

the technological developments in the marketing industry, today's government propaganda has expanded to all forms of media, and it has attempted at all kinds of communications techniques, ranging from "prepackaged news,"¹²⁰ online advocacy,¹²¹ "cognitive infiltration",¹²² to targeted opinion shaping with big data and artificial intelligence.¹²³ Free speech concerns arise more prominently in connection with the use of these propaganda techniques. Although "more speech" tends to be the classical American response to failures in the marketplace of ideas,¹²⁴ it is also generally worried that propaganda operations are prone to selective and potentially biased executions and that government information may crowd out alternative voices, causing distortion of the total information mix.¹²⁵ A potential trade-off between legitimacy and efficacy, therefore, may exist in using counter information-based regulatory strategies on networked falsehoods.

¹²⁰ Christopher Lee, *Update: Prepackaged News*, WASH. PO. (Feb. 14, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/13/AR2006021301897.html>

¹²¹ John Maxwell Hamilton & Kevin Kosar, *How the American Government is Trying to Control What You Think*, WASH. PO. (Sept. 24, 2015), https://www.washingtonpost.com/posteverything/wp/2015/09/24/the-new-propaganda-how-the-american-government-is-trying-to-control-what-you-think/?utm_term=.782749e51b3a.

¹²² *SEE SUPRA* NOTE 6.

¹²³ Rachel Revesz, *Steve Bannon's Data Firm in Talks for Lucrative White House Contracts*, INDEPENDENT (Nov. 23, 2016), <http://www.independent.co.uk/news/world/americas/cambridge-analytica-steve-bannon-robert-rebekah-mercere-donald-trump-conflicts-of-interest-white-a7435536.html>.

¹²⁴ *See e.g. Sullivan, supra* note 92 at 270; *Brown v. Hartlage*, 456 U.S. 45, 61 (1982); *Alvarez, supra* note 84 at 2555-56.

¹²⁵ Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005).

4. The libertarian approach and its plausibility

While late events demonstrate that false information poses serious challenges to even open societies with strong institutions for free speech and well-educated constituents, some skeptics continue to raise reasonable doubt about the actual magnitude of the problem.¹²⁶ Based on an analysis of social media and survey data, for example, Allcott and Gentzkow demonstrate that voter exposure to online fake news prior to the 2016 U.S. presidential election is less than popularly presumed, and is thus the wrong culprit to blame for the electoral outcome.¹²⁷

Notwithstanding uncertainties about any causal relations between fake news and U.S. election, at a more general level, the problem of boundedly rational actors falling for unverified information has long been established as systemic rather than anecdotal. In the context of consumer markets, economists George Akerlof and Robert Shiller have observed that the social and economic cost in relation to consumers acting upon false and deceptive information is very significant, and without regulation, the market equilibrium could well be one of fraud and manipulation.¹²⁸ In the context of political and governance-related decision-making, the cost of misleading and deceptive

¹²⁶ Ryan Bourne, *Fake News Is Troubling — but Censorship Is Far Worse*, Cato Institute <https://www.cato.org/publications/commentary/fake-news-troubling-censorship-far-worse>; Volokh, *supra* note 56.

¹²⁷ Allcott & Gentzkow. It appears, however, that in the published version of their paper Allcott and Gentzkow retreated from the conclusion they made in an earlier version that the electoral effect of fake news is exaggerated. See Neil Irwin, *Researchers Created Fake News. Here's What They Found*, NYTimes (Jan. 18, 2017), https://www.nytimes.com/2017/01/18/upshot/researchers-created-fake-news-heres-what-they-found.html?_r=0.

¹²⁸ George A. Akerlof and Robert J. Shiller, *Phishing for Phools: The Economics of Manipulate and Deception* (2015) (“phishing equilibrium”).

information is also real and credible, albeit more difficult to tally. Even if not necessarily powerful enough to always sway elections,¹²⁹ misinformation in public affairs still poses a serious threat to the core mechanisms of governance with rational deliberation under either democratic or authoritarian political conditions.¹³⁰

Free speech libertarians in fact rarely propose that no harms can be done by falsehoods. Instead, legal and regulatory interventions appear unnecessary to them because many trust competitive forces in a marketplace of ideas, to the extent free and open, be adequate to fix the problems. By all means, the predominant free speech rhetoric since John Milton is that truth will eventually prevail over the false;¹³¹ if public goods such as corrective information and proper content filtering are needed, they could be supplied at least in a large part through market organizations and transactions. Indeed, in commercial settings business firms and individuals have commonly invested in public relation capacities that could be deployed in response to negative or malicious rumors. Good Samaritan, collaborative search for truth is also common in cyberspace thanks to the lowered cost of coordination, and crowd-sourced fact checking conceivably can play an important role in producing the public good of rumor rebuttal.¹³² Well known, dedicated fact-checking sites, such as Snopes and PolitiFact in the United States, do emerge as voluntary pursuits. Major firms such as Google and

¹²⁹ *But see* Issie Lapowsky, *Trump's Big Data Mind Explains How He Knew Trump Could Win*, WIRED (Nov. 9, 2016), <https://www.wired.com/2016/11/trump-polling-data/>.

¹³⁰ SUNSTEIN, *REPUBLIC.COM 2.0* (2007).

¹³¹ Frederick Schauer, *Facts and the First Amendment*, 57 *UCLA L. REV.* 897, 898 (2010).

¹³² *See* LESSIG, *SUPRA* NOTE 9 AT 243 (noting examples of collaborative verification of truth in the blogosphere).

Facebook, in the immediate aftermath of the 2016 controversies, have also already started to take steps in experimenting tools for controlling false information spread on their platforms.¹³³

The efficacy of these Coasean or Ellicksonian solutions, however plausible, ultimately need be tested in practice.¹³⁴ Theoretically, there are good reasons to doubt if minimum government intervention is adequate and optimal. The incentive structure of today's commercial media, in particular internet social media, does not warrant maximization of its supply of truthful information to the market.¹³⁵ The production of information public good, such as correction to falsehoods, is not costless; the "Brandolini's law" speaks famously to the asymmetry in costs of producing false versus truthful information.¹³⁶ As the 20/80 law of influence and dissemination applies to online communication networks, most individual nodes in the network continue to face a considerable cost in effectively reaching a broad enough audience. Private incentives to invest in the sophisticated and expensive use of communication tools and networks should never be taken for granted. And since widespread falsehoods affect the choices and decisions of dispersed individuals, there are collective action challenges for the

¹³³ Peter Kafka, *If you don't share this story, Facebook might think it's fake*, RECODE (Dec. 16, 2016), <https://www.recode.net/2016/12/16/13982934/facebook-fake-news-sharing-adam-mosseri>; <https://www.recode.net/2017/3/4/14816254/facebook-fake-news-disputed-trump-snoops-politifact-seattle-tribune>.

¹³⁴ That is, following the U.S. Supreme Court's judicial philosophy announced in, for example, *Abrams v. United States*, 250 U.S. 616 at 624–31 (Holmes, J., dissenting), and *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

¹³⁵ *Supra* note 41.

¹³⁶ Phil Williamson, *Take the Time and Effort to Correct Misinformation*, NATURE (Dec. 6, 2016), <http://www.nature.com/news/take-the-time-and-effort-to-correct-misinformation-1.21106?cookies=accepted>.

affected public to coordinate rumor control and rebuttal efforts.

Therefore, as Tim Wu describes in the related context of manipulative advertising practices, spontaneous, market-based actions, without more, are unlikely a sustainable source of public good such as falsehoods regulation.¹³⁷ The U.S. experience with the Section 230 immunity also famously illustrates the point. The well-known legislative intent of this statute was to encourage internet companies to take voluntary actions over contents on their platforms by assuring them not to worry about failing to do perfectly.¹³⁸ As many critics point out, the exemption, in reality, leads to little-to-nil incentives for intermediary platforms to implement adequate self-regulation.¹³⁹ The resulting regulatory vacuum over the years has contributed to a range of problems on the Internet, including rampant networked falsehoods.

Although the libertarian response alone may be inadequate, for obvious political, economic and practical rationales, it can be safe to predict that government authorities have considerable incentives to have market players join forces in regulating networked falsehoods. Conceivably, through mobilizing private supplies of censorship and counter information, the government may bypass legal restrictions on its own actions, save direct regulatory cost, enhance the appearance of legitimacy, and leverage sometimes superior regulatory capacities.¹⁴⁰ The dynamic relation between private ordering and

¹³⁷ WU, *SUPRA* NOTE 39 AT 273-76.

¹³⁸ *Zeran*, 129 F.3d at 331.

¹³⁹ Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 389–410 (2005); Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. CON. REV. 221, 222–25 (2006).

¹⁴⁰ *See* LESSIG, *SUPRA* NOTE 9 AT 170.

legal regulation is thus an important aspect as we consider the legal regulation of networked falsehoods in practice.

C. Summary

The foregoing Section B. is not intended as an elaboration of all relevant issues in American free speech theories. Instead, my goal is to identify and reflect on concerns lawyers are often forced to grapple with in this context. To summarize, from the conventional perspective of American free speech theories, actual or proposed legal regulation of networked falsehoods typically raises the following concerns: (1) liabilities laws may have excessive chilling effects on speech and expressions across the society, and may be abused by the government as a tool for deliberate suppression of dissents; (2) censorship will result in removal from the total mix too much valuable information, and undermine the development of a vibrant Internet premised on information freedom; (3) counter information could be reduced to manipulative propaganda; (4) besides their negative effects, all three paradigms of legal regulation are doubtfully effective in responding to the networked falsehoods problem; and (5) focusing on legal regulation will let practitioners and analysts lose sight of voluntary and market-based responses.

These concerns, albeit plausible, could be potentially counterweighed by a range of socio-economic, institutional and behavioral factors. To predict the net outcome of legal regulation through balancing these concerns and counter-veiling factors requires one to navigate daunting uncertainties. Such uncertainties, as Frederick Schauer notes

in a broader context, contribute to American lawyers' general inclination to err on underestimating regulatory benefits and overestimating regulatory cost to reduce regulatory false positives.¹⁴¹ In recent times, however, complaints are increasingly heard about the prudential margin of error being too large, thanks to the rising salience of speech harms that used to be downplayed or overlooked in normative analysis.¹⁴² But while opponents of speech regulation may be too obsessed with assuming the worst, proponents also risks being too easily tempted by regulation's purported benefits.

Debates of this nature are hardly resolved in the abstract. Instead of simply assuming the worst about networked falsehood regulation and premising normative arguments on the same, one useful way to move forward could be to actually look into a "worst-case scenario," and observe how the free speech concerns play out as they interact with pragmatic dynamics.

IV. REGULATING NETWORKED FALSEHOODS IN CHINA

In the Western discourse on free speech, China is most often considered as one among the worst-case scenarios for speech regulation. While scant for the moment, more thoughtful and empirically informed comparative discussions of China's experiences with regulating networked falsehoods can be expected to increase as Americans reflect further on the late controversies at home.¹⁴³ The following analysis,

¹⁴¹ *Supra* note 10.

¹⁴² CITRON, *SUPRA* NOTE 45; Brown, *supra* note 87.

¹⁴³ Will Ford, *Americans Could Learn Something From China About Dealing With Fake News*, HUFF. PO. (Jun. 6, 2017), http://www.huffingtonpost.com/entry/united-states-china-fake-news_us_592494d5e4b00c8df29f88d7.

attempting at an early contribution to such comparative research, shows that the China case offers more than just a cautionary tale against diverging from a libertarian baseline for the law of Internet speech.¹⁴⁴

A. Background

1. The theory of political control

Controlling networked falsehoods, popularly known as the “internet false rumors” (*wangluo yaoyan*) in the Chinese context, has long preoccupied China’s official regulatory agenda over the commercial and civil Internet. China’s internet rumor problem first became nationally salient during the crisis of the Severe Acute Respiratory Syndrome (“SARS”) epidemics in 2003.¹⁴⁵ In subsequent years, internet falsehoods and hoaxes had become a regular encounter for a society that eventually would boast the largest number of internet users in the world.¹⁴⁶ According to a government-sponsored survey in 2016, more than 60% of adult Chinese internet users report seeing online falsehoods on a frequent basis.¹⁴⁷ Another survey-based

¹⁴⁴ Example of drawing lesson in such manner, see e.g. Ryan Pickrell, *Lessons for the Left: How China Handles Fake News and Cuts off 700 Million Web Users from the World*, DAILY CALLER (Dec. 25, 2016), <http://dailycaller.com/2016/12/25/lessons-for-the-left-how-china-handles-fake-news-and-cuts-off-700-million-web-users-from-the-world/>.

¹⁴⁵ Ringo Ma, *Spread of SARS and War-Related Rumors through New Media in China*, 56 COMMUNICATION QUARTERLY 376 (2008).

¹⁴⁶ As of June 2017, China’s Internet user population was 751 million. CNNIC, *The 40th China Statistical Report on Internet Development*, Jul. 2017, <http://cnnic.cn/hlwfzyj/hlwzxbg/hlwtjbg/201708/P020170807351923262153.pdf>, p.13.

¹⁴⁷ Wangluo Yaoyan Chuanbo Ji Chengnian Ren Renzhi Qingkuang Yanjiu Baogao Zai Jing Fabu (网络谣言传播及成年人认知情况研究报告在京发布) [*The Research Report on the Dissemination and Reception of Internet Rumors Among Adult Citizens Publicized in Beijing*], PEOPLE.CN (Aug. 2016), <http://society.people.com.cn/n1/2016/0802/c229589-28605156.html>.

experiment conducted in 2012 found that China's netizens have difficulties in recognizing as untrue 90% of false stories presented to them.¹⁴⁸

Most falsehoods on China's Internet, as elsewhere, had only transient influence. But many episodes have remained memorable. For best known running examples, there were product hoaxes about oranges infested with worms and bananas being carcinogenic, each resulting in steep sales plunge¹⁴⁹; business reputation attacks on the French retail chain Carrefour about its alleged financial supports to the Tibetan separatist movement, leading to nationwide consumer boycotts;¹⁵⁰ false public health warnings, in the wake of the Japanese earthquake and nuclear crisis in 2011, about the anti-radiation effect and supply shortage of iodized salt, triggering widespread panic purchase;¹⁵¹ and political rumors about various sorts of authorities mishandling the Yong-Wen Railway collision accident of 2010, causing major public relation crisis to the central government.¹⁵²

The Chinese government has repeatedly promised to meet falsehoods propagators

¹⁴⁸ GUO XIAOAN (郭晓安), DANGDAI ZHONGGUO WANGLUO YAoyan DE SHEHUI XINLI YANJIU (当代中国网络谣言的社会心理研究) [A SOCIAL PSYCHOLOGICAL STUDY ON INTERNET RUMORS IN CONTEMPORARY CHINA] 106-8 (2015).

¹⁴⁹ In the orange case, loss in the orange case is reported to be in billions. See e.g. *People's Daily's List of Top 10 Online Rumors*, XINHUA (Apr. 16, 2012), http://news.xinhuanet.com/society/2012-04/16/c_111782449.htm.

¹⁵⁰ See *supra* note 31.

¹⁵¹ See Zhang Lei & Guo Xiaotong (张蕾、郭晓桐), Yaoyan, Xinren yu Quntixing Shijian: Jiyu Yaoyan he Qiangyan Fengbo de Diaocha Yanjiu (谣言、信任与群体性事件: 基于谣言和抢盐风波的调查研究) [*Rumor, Credibility and Mass Incident: Based on the Research about Salt Rumors and Salt Panic*], Guoji Xinwen Jie (国际新闻界)[INTERNATIONAL MEDIA], no.7, 2012, at 12.

¹⁵² GUO, *SUPRA* NOTE 148 AT 81-83 (documenting rumors relating to the accidents, including such that alleged disparity in compensation for Chinese and foreign victims and the inefficacy in rescue operations due to motives of covering up.)

with “zero tolerance.”¹⁵³ In practice, government authorities deploy the full range of regulatory tools towards the goal of “cleaning up” the cyberspace. Western observers commonly focus on highly publicized criminal prosecutions¹⁵⁴ and the massive censorship system.¹⁵⁵ Since the Chinese state’s internet content regulation is obviously more draconian than that of the west, one would easily presume the same reflects no more than an authoritarian regime’s desire to control information. Even close observers, finding that China in regulating networked falsehoods eyes on much more than political information, still tend to interpret such pattern from exclusively the political control perspective.¹⁵⁶

This conventional perspective is sound but inadequate. Indeed, since its pre-Internet history, China’s rumor laws have explicitly targeted political speech and speakers,¹⁵⁷ which contrasts starkly with the U.S. approach of effectively exempting

¹⁵³ See e.g. Jingfang dui Chuanbo Wangluo Yaoyan Ling Rongren (警方对传播网络谣言零容忍) [*Police Practices Zero Tolerance Against Spreading Internet Rumors*], NETEASE NEWS (Jul. 5, 2016), <http://news.163.com/16/0705/16/BR7N2V6G00014Q4P.html>.

¹⁵⁴ See e.g. Anthony Kuhn, *New Chinese Law Cracks Down On 'Rumor Mongers'*, NPR (Sept. 26, 2013), <http://www.npr.org/sections/parallels/2013/09/25/226181016/new-chinese-law-no-rumormongering>; *China Praises Arrests of 'Rumour-mongering' Estate Agents*, Financial Times (Sept. 11, 2016), <https://www.ft.com/content/21ced426-77e7-11e6-97ae-647294649b28?mhq5j=e3>.

¹⁵⁵ See e.g. REBECCA MCKINNON, *CONSENT OF THE NETWORKED: THE WORLD-WIDE STRUGGLE FOR INTERNET FREEDOM* (2012), CH.3.

¹⁵⁶ See e.g. Jason Q. Ng, *Politics, Rumors, and Ambiguity: Tracking Censorship on WeChat's Public Accounts Platform*, CITIZEN LAB (Jul. 20, 2015), <https://citizenlab.org/2015/07/tracking-censorship-on-wechat-public-accounts-platform/>; King et al., *supra* note 108. See also Jason Q. Ng, *China's Rumor Mill: Why Beijing Is Cracking Down on "Unverified" Information Online*, FOREIGN AFFAIRS (Oct. 2015), <https://www.foreignaffairs.com/articles/china/2015-10-06/chinas-rumor-mill>

¹⁵⁷ The first formal legal document promulgated by the communist government in which “rumor” was mentioned, as expected, is a 1951 statute (subsequently

political speech from falsehoods regulation.¹⁵⁸ In China, harsh, criminal sanctions and stringent censorship are more likely to be imposed on propagators of false information that implicates the government.¹⁵⁹ And from time to time governments at different levels may censor and/or prosecute critics or journalists in the name of regulating falsehoods.¹⁶⁰ Given that political rumors with an anti-government slant may have the effect of undercutting public support for the government in authoritarian regimes,¹⁶¹ it is not surprising that the Chinese state in this area behaves in a particularly vigilant and aggressive manner. But as more careful students of China's internet communications have increasingly realized, conventional perspectives centering upon the suppression of political speech in western literature has encouraged tunnel vision and considerably oversimplified the relationship between the Chinese state and the Internet.¹⁶² For the

abolished) on punitive sanctions on counter-revolutionaries. *See* Zhonghua Renmin Gonghe Guo Chengzhi Fan Geming Tiaoli (中华人民共和国惩治反革命条例) [THE PEOPLE'S REPUBLIC OF CHINA PROVISIONS ON PUNISHING COUNTER-REVOLUTIONARIES] (1951) (Abolished).

¹⁵⁸ *See supra* note 83 at 1048.

¹⁵⁹ Two highly publicized cases reflect exactly such pattern. *See e.g.* Neil Thomas, *China's Two Greatest Internet Rumor Mongers and "Black PR" Philanderers arrested*, DANWEI (Aug. 22, 2013), <http://www.danwei.com/chinas-two-greatest-internet-rumor-mongers-and-black-pr-philanderers-arrested/>

¹⁶⁰ In a highly publicized case in 2013, for example, a journalist was detained by local police for fabricating false reports about a large public company after allegedly taking bribes from the rumor target's competitor. Suspicion of capture was raised when the public noticed that when the police officers went to arrest the journalist, they reportedly were driving a Mercedes that may belong to the rumor target company. *See* Heng Shao, *Reporter's Arrest Hammers Zoomlion; Sany Can't Escape Fallout*, FORBES (Oct. 25, 2013), <http://www.forbes.com/sites/hengshao/2013/10/25/reporters-arrest-hammers-zoomlion-sany-cant-escape-fallout/>.

¹⁶¹ Haifeng Huang, *A War of (Mis)Information: The Political Effects of Rumors and Rumor Rebuttals in an Authoritarian Country*, 47 BRIT. J. POLIT. SCI. 283 (finding evidence of such effect through survey-based experiments).

¹⁶² *See e.g.* HONG YU, NETWORKING CHINA: THE DIGITAL TRANSFORMATION OF THE CHINESE ECONOMY 6 & 10 (2017).

contemporary history that spans the past three decades, the political control theory alone offers only a partial account of both China's networked falsehoods problem and its approaches to legal regulation.

2. Networked falsehoods in China

A more useful examination of the China case may start with noting some basic behavioral and structural characters of China's interpersonal communication networks that plausibly render China's Internet particularly vulnerable to falsehoods infestation. First, with high internet penetration and less educated netizen population,¹⁶³ both individual and group thresholds in China are relatively low with respect to belief in and act upon falsehoods.¹⁶⁴ Second, as the Chinese society traditionally favors¹⁶⁵ and continues to emphasize fostering strong ties and promoting network closure,¹⁶⁶ the ubiquity of clustered strong-tie networks considerably facilitates the transmission and influence of falsehoods. Third, as recent case studies report, proliferation of different types of commercial social media applications in China has enabled a powerful

¹⁶³ According to data made available by the United Nations Development Programme, in 2010 the mean years of schooling of adults is 13.3 years and 7.0 years in the United States and China, respectively. <http://data.uis.unesco.org/#>.

¹⁶⁴ In a case study on the Salt Rush Rumor in China researchers found that there the level of education is the only demographic variable about the rumor audience that meaningfully correlated with rumor belief and action. See Zhang & Guo, *supra* note 151 at 15. Other tested variables in the same study include gender, age, occupation, and level of income.

¹⁶⁵ See Ruan et. al., *On the Changing Structure of Social Networks in Urban China*, 19 SOCIAL NETWORKS 75 (1997); Bian, Yanjie, *Bringing Strong Ties Back in: Indirect Ties, Network Bridges, and Job Searches in China*, 62 AM. SOCIO. REV. 366 (1997). Cf. McPherson et al., *Social Isolation in America: Changes in Core Discussion Network over Two Decades*, 71 AM. SOCIO. REV. 353 (2006).

¹⁶⁶ See Zhixing Xiao & Anne S. Tsui, *When Brokers May Not Work: The Cultural Contingency of Social Capital in Chinese High-Tech Firms*, 52 ADMIN. SCI. Q. 1 (2007).

falsehoods dissemination pattern of “media plus interpersonal social networks,”¹⁶⁷ where false rumors achieve broad reach through weak-tie social media (such as Sina Weibo) and, meanwhile, considerable influence through further diffusion into acquaintance networks of cell phone or strong-tie SNS (such as Tencent’s WeChat) contacts.¹⁶⁸

Besides these behavioral and social network issues, it is even more important to see that China’s networked falsehoods problem has become increasingly connected to networks of commercial interests embedded in its fast-growing internet market. Similar as in elsewhere, the ad revenue based business models in China’s internet market contribute significantly to the massive incentives to produce false information.¹⁶⁹ In especially the early days, sensational falsehoods and hoaxes have been a driver of user traffic for many of China’s commercial websites, content platforms, and social networking sites. In the intensely competitive market of internet media, new entrants survive only through pursuing fast growth and scalability, and operators, as a result, have limited incentives based on the corporate social responsibility to self-regulate

¹⁶⁷ Tang Xujun (唐秀军) (ed.), *Di Qi Ci Zhongguo Xin Meiti Fazhan Baogao* (第七次中国新媒体发展报告) [THE SEVENTH REPORT ON THE DEVELOPMENT OF NEW MEDIA IN CHINA], 2016, at 5.

¹⁶⁸ For example, Zhou noted that cell phone text messages played an instrumental role in the AIDS rumor, the worms-in-oranges rumor, the kidnapping of Shenzhen school children rumor and the Salt Rush rumor. ZHOU, *SUPRA* NOTE 37 AT 5 and 10. In addition, for a summary of research on WeChat’s facilitative role in rumor dissemination through strong tie network, see TANG, *SUPRA* NOTE 167 AT 105.

¹⁶⁹ Hu Ling (胡凌), Wangluo Chuanbo Zhong de Zhixu Yaoyan yu Zhili (网络传播中的秩序、谣言与治理) [*Order, Rumors and Governance in Internet Communications*], *Wenhua Zongheng* (文化纵横) [BEIJING CULTURAL REVIEW], no.5, 2013.

controversial contents such as falsehoods, pirated works, and pornography.

Most notably, the rise of a gray market for “pushing hands” networks, in response to popular industry demand for self-promotion through cheating reputation systems and attacking competitors through malicious marketing campaigns, entrenches the use of falsehoods as a routine business and competitive practice.¹⁷⁰ As multiple investigations have now uncovered, in the recent decade or two, the majority of viral dissemination incidents in China, including many influential internet rumors, involve the use of “pushing hands” networks by commercially and/or politically motivated interest groups.¹⁷¹ The operations of pushing hands over the years have become highly sophisticated, mastering all types of online viral marketing techniques, ranging from clickbait headlines¹⁷² to artificial intelligence.¹⁷³

It is critical therefore to understand China’s networked falsehoods as also a complex governance problem facing the authorities. More precisely, in responding to

¹⁷⁰ As of 2010, the number internet pushing hand firms active in Beijing was reported to be more than 100, and some report that over 70% of registered accounts of major online forums are members of pushing hand networks. See Shei zai Caozong Wangluo Yulun (谁在操纵网络舆论) [*Who Is Manipulating Online Public Opinion?*], IT shidai zhouban (IT 时代周刊) [IT TIMES WEEKLY] (Jan. 17, 2010), <http://tech.sina.com.cn/i/2010-01-11/15233759198.shtml>; WU & CAO, *SUPRA* NOTE [98]; Wang Ziwen & Ma Jing (王子文、马静), Wangluo Yuqing Zhong de Wangluo Tuishou Wenti Yanjiu (网络舆情中的网络推手问题研究) [*A Study on the Problem of Pushing Hands in Online Public Opinions*], Zhengzhi Xue Yanjiu (政治学研究) [POLITICAL SCIENCE RESEARCH] no.2, 2011, at 52.

¹⁷¹ *Id.*

¹⁷² GUO, *SUPRA* NOTE 148 AT 93-97.

¹⁷³ Hu Ling (胡凌), Shangye Wangluo Tuishou de Yanjin yu Falv Huiying (商业网络推手的演进与法律回应) [*The Evolution of Commercial Internet Pushing Hands and Its Legal Responses*], Jingji Fa Luncong (经济法论丛) [ECONOMIC LAW REVIEW], no.2, 2017.

the networked falsehoods problem, the Chinese state is driven by multifaceted as opposed to a singular institutional incentive. Besides suppressing dissents to keep a tight grip on power, the Chinese government expects to provide public goods such as public health, safety and an orderly consumer market as necessary to underscore its claim to legitimacy. The developmental state also has a particularly strong interest in growing its commercial internet communication technology (“ICT”) sector. These objectives are not perfectly aligned with each other, and these tensions inevitably have their impact on institutional behaviors and regulatory outcome.

B. Liability Laws and Chilling Effect in China

1. The *prima facie* case for over-chilling

China’s formal liability laws on networked falsehoods demonstrate a clear tendency for over-chilling, in particular as compared with the U.S. law. First, Chinese laws and regulations on networked falsehoods are overall written in vague and overbroad manners, drawing critiques that they allow authorities to easily expand the web of liabilities as they see fit.¹⁷⁴ The undefined, largely colloquial references to “rumors” appear in most authoritative legal documents ranging from major

¹⁷⁴ Bryan Druzin & Jessica Li, *Censorship’s Fragile Grip on the Internet: Can Online Speech Be Controlled?* 49 CORNELL INT’L L. J. 369, 375-377 (2016).

legislation¹⁷⁵ to administrative and agency rules.¹⁷⁶ Rumor propagators are also frequently punished for “instigating public disorder,”¹⁷⁷ typically understood as a catch-all offense under both criminal and administrative sanction laws. Unlike in the U.S. context, vagueness and overbreadth offer no grounds for meaningful constitutionality challenges under Chinese law.

Second, as compared with the U.S. law, China’s civil law of liabilities looks much friendlier to plaintiffs in personal and business defamation suits.¹⁷⁸ A public figure doctrine or similar first amendment-inspired limits to liability, for example, have never been formally codified or consistently applied. Instead, as first developed through adjudication and subsequently codified, there is actually a “reverse” public figure

¹⁷⁵ See e.g. Art. 105 of Xingfa (刑法) [CRIMINAL LAW]; Art. 25(1) of Gonggong Anquan Guanli Chufa Fa (公共安全管理处罚法) [Public Safety Administration and Sanction Law]; Art. 37 of Youzheng Fa (邮政法) [THE POSTAL LAW]; and Sec. 2 of Quanguo Renda Changweihui Guanyu Weihu Hulian Wang Anquan de Jueding (全国人大常委会关于维护互联网安全的决定) [THE NPCSC LEGISLATIVE DECISION ON SAFEGUARDING INTERNET SECURITY].

¹⁷⁶ On matters such as telecommunication, internet information services, government transparency, planning for natural disaster, public health and other exigencies, and stock offering and trading. See e.g. Dianxin Tiaoli (电信条例) [Telecommunication Regulations]; Gupiao Faxing yu Guanli Zanxing Tiaoli (股票发行与管理暂行条例) [Provisional Rules on Stock Issuance and Trading Administration]; Hulianwang Xinxi Fuwu Guanli Banfa (互联网信息服务管理办法) [Internet Information Service Administration Rules]; Tufa Gonggong Weisheng Shijian Yingji Tiaoli (突发公共卫生事件应急条例) [Provisions on Responding to Public Health Emergency Incidents].

¹⁷⁷ Zuigao Renmin Fayuan Zuigao Renmin Jiancha Yuan Guanyu Banli Liyong Wangluo Shishi Feibang Deng Xingshi Anjian Shiyong Falv Ruogan Wenti de Jieshi (最高人民法院最高人民检察院关于办理利用网络实施诽谤等刑事案件适用法律若干问题的解释) [INTERPRETATION OF THE SUPREME PEOPLE’S COURT AND THE SUPREME PEOPLE’S PROCURATORATE ON SEVERAL ISSUES CONCERNING THE SPECIFIC APPLICATION OF LAW IN THE HANDLING OF DEFAMATION THROUGH INFORMATION NETWORKS AND OTHER CRIMINAL CASES], Sec. 5, 2013.

¹⁷⁸ Benjamin L. Liebman, *Scandal, Sukyandaru, and Chouwen*, 106 MICH. L. REV. 1041, 1064-67 (2008).

doctrine, which purportedly holds influential public personalities to a higher standard of care for disseminating false information.¹⁷⁹

Third, multiple criminal statutory provisions in China have been legislated or formally interpreted to target more egregious propagators of false information, including but not limited to national security, public and social order, business and product reputation and the ordinary workings of the securities market.¹⁸⁰ Maximum penalties for rumor propagators, varying with the nature of harms and corresponding offenses, may range from two to ten years,¹⁸¹ which is considerably more severe than sanctions under the few U.S. criminal statutes against rumormongers (with perhaps the only notable exception of criminal securities fraud). For more commonplace, “small-

¹⁷⁹ In *Zhou Hongyi v. Kingsoft*, the court compelled a corporate CEO to apologize for his online commentaries, reasoning that “as a public figure” the CEO as a high profile figure in the society should have been more careful about his statements made in public. See *Beijing Jinshan Anquan Ruanjian Youxian Gongsi Su Zhou Hongyi* (北京金山安全软件有限公司与周鸿祎侵犯名誉权纠纷案) [*Beijing Kingsoft Security Software Co. v. Zhou*] (The First Intermediary People’s Court of Beijing 2011) (China); Jyh-An Lee, *Regulating Blogging and Microblogging in China*, 91 ORE. L. REV. 609, 616-20 (2012). In its most recent judicial interpretive rules on Internet tort promulgated in August 2014 (the “Internet Tort Rules”), the Supreme People’s Court further formalized this approach, requiring unequivocally individuals or entities to fulfill, when playing the role of a secondary publisher, a duty of care “corresponding to their respective nature and scope of influence.”

¹⁸⁰ See *Xingfa* (刑法) [CRIMINAL LAW], Art. 181 (fabricating and disseminating false information regarding securities and futures transactions), Art. 221 (damaging commercial reputation and product reputation), Art. 246 (criminal libel), Art. 291 (disseminating terror information; disrupting order in public place or transportation by aggregating a crowd); and Art. 293 (provocation and causing disturbances).

¹⁸¹ Under Chinese law, rumor propagators may be prosecuted and punished by up to two years in jail for spreading rumors that disparage business or product reputation, and up to five years for false rumors involving securities and futures transactions. In egregious cases, some rumor propagators were reported to be charged under the provision against criminal extortion, which is a much more serious offense punishable by up to ten years in prison. More controversially, there is also a provision against “instigating public disorder” in the Criminal Law that can be used to prosecute rumor propagators for up to five years in jail.

time” rumormongers falling outside of the criminal law’s purview, various administrative laws and regulations grant police authorities significant discretion in imposing non-penal sanctions in the forms of fines and short-term administrative detention up to fifteen days.¹⁸² In addition, market regulators such as the Business and Industrial Administration and the Securities Regulation Commission have statutory powers to impose fines and other administrative sanctions on commercial entities within their respective jurisdictions.¹⁸³ The over eighty million members of the ruling Communist Party are subject to yet further rules prohibiting inappropriate speech and commentaries, including spreading unverified information, violation of which triggers disciplinary actions and losing government jobs.¹⁸⁴

The foregoing easily produces the impression that China has knitted a watertight web of liabilities that, presumably, should strongly deter propagators of networked falsehoods and leave limited breathing space for people to engage in otherwise

¹⁸² Xingzheng Chufa Fa (行政处罚法) [ADMINISTRATIVE SANCTION LAW], Art.25 & 42. It should be noted that prior to the abolishment of “re-education through labor” in 2013, the police has power to impose on rumor offenders up to two year of detention at the reeducation facility without much court oversight.

¹⁸³ See e.g. Hainan Zhongquan Daji Fangdichan Xujia Guanggao (海南重拳打击房地产虚假广告) [*Hainan Cracks Down on False Advertisement in the Real Estate Sector*], SINA FINANCE (Mar. 15, 2017), <http://cj.sina.com.cn/article/detail/6134099828/189147?cre=tianyi&mod=wpage&loc=5&r=9&doct=0&rfunc=0&tj=none&s=0&tr=9> (BAIC enforcing anti-rumor provisions under the Advertisement Law); Zhengjianhui: Jiada Dui Yaoyan Jiance yu Xiansuo Faxian Lidu (证监会：加大对谣言监测与线索发现力度) [CSRC: Tightening the Monitoring of Rumors and Discovery of Leads], STCN (Oct. 15, 2016), <http://www.stcn.com/2016/1015/12908507.shtml> (the CSRC enforcing anti-rumor provisions under the Securities Law).

¹⁸⁴ Art. 45 & 46 of Zhongguo Gongchan Dang Jilv Chufen Tiaoli (中国共产党纪律处分条例) [CHINESE COMMUNIST PARTY DISCIPLINARY RULES] (2016) (specifying disciplinary actions against party members who make certain types of speech that deviate from party lines).

legitimate expressions and exchanges of information that borders with the vaguely defined falsehoods.

2. The reality of chilling

A closer look into China's liability laws in action, however, suggests that significant enforcement difficulties prevent such laws from producing a strong chilling effect on average individual speakers in any generalized and sustained manner. Although comprehensive and coherent statistics on China's enforcement of its liability laws do not exist, the foregoing conjecture can be effectively supported by the following analysis based on common institutional logic as well as indicative information from official and non-official sources.

First, as a rather intuitive matter, however draconian and excessive China's prosecution of falsehoods propagators for public law sanctions may look, the sheer magnitude of networked falsehoods incidents easily dwarfs the number of cases the authorities have the will and capacity to actually prosecute. To have a crude idea of how massive the quantity of potentially prosecutable posting and reposting act is on China's Internet, one may take a cue from information made available from China's major social media platforms. As researchers at Tsinghua University scraped data from Sina Weibo, they were able to collect 9,079 unique pieces of falsehoods posts that the platform archived after receiving users reports from August 2011 to May 2013, during which period these posts were reposted about 6.9 million times in total.¹⁸⁵ In addition,

¹⁸⁵ Zhiyuan Liu, Le Zhang, Cunchao Tu, Maosong Sun, Zhongwen Shejiao Meiti Yaoyan Tongji Yuyi Fenxi (中文社交媒体谣言统计语义分析) [*Statistical and*

according to Tencent WeChat's first-time official disclosure, in 2016 (through November) the SNS platform identified 200,000 unique pieces of falsehoods articles, blocked 1.2 million links to those articles and suspended or deleted 100,000 accounts for falsehoods-related activities.¹⁸⁶ Both the Weibo and WeChat numbers are about identified, not total, falsehoods posts on their respective platforms for the relevant period. The total presumably would be much larger, and that should be particularly true for Weibo. For WeChat, meanwhile, it also has little reason to over-report the falsehoods problem under its own watch for obvious compliance and reputation concerns. Importantly, one needs also be reminded that Weibo and WeChat, albeit the most popular and heavily scrutinized players, are far from equivalent to the entire social media market of over 1,300 providers.¹⁸⁷

In light of the above, even one, *arguendo*, would assume extremely conservatively that each year across China there is no more than 100,000 individuals who engage in posting and reposting activities in a manner that could be potentially prosecutable for criminal or administrative sanctions, the police authorities, primarily responsible for initiating public law prosecutions, would still be unable to investigate into more than a fraction of these individuals. In 2013, for example, as the Ministry of Public Security ("MPS") rolled out a very prominent and deliberately harsh nationwide crackdown on

Semantic Analysis of Rumors in Chinese Social Media], 45 *Zhongguo Kexue: Xinxi Kexue* (中国科学: 信息科学) [CHINA INFORMATION SCIENCES], vol.45, 2015, at 1536.

¹⁸⁶ Weixin Shengtai Anquan Baogao: Weixin Chuli Yaoyan Jian Shu Da Yibai Ershi Wan (微信生态安全报告: 微信处理谣言数达一百二十万件) [*WeChat Ecology Security Report: WeChat Processed Over 1.2 Million Links To Rumors*], WECHAT (Nov. 24, 2016), http://mp.weixin.qq.com/s/5mf0CBjVRgjDvRVr_ppacQ.

¹⁸⁷ See King et al., *supra* note 108.

internet rumors, the most aggressive estimate for the number of prosecuted individuals during this campaign from June to September was several hundred.¹⁸⁸ In 2015, as the MPS hit with another round of crackdown campaign, it was officially disclosed that 197 individuals nationwide were prosecuted for spreading rumors amid sensitive events.¹⁸⁹ As commonly observed, the police authorities carry out enforcement of public law sanctions against networked falsehoods primarily in the periodical campaigns and otherwise are unable to maintain a high enforcement pressure as a regular matter.¹⁹⁰ But for those years when harsh campaigns took place, as the foregoing illustrates, the average prosecution risk an individual faces for engaging in borderline speech seems still as small as below one percent.

Second, despite the availability of harsh criminal sanctions on the book, the great majority of prosecutions of individuals for propagating falsehoods resulted in public order sanctions of much less severe consequences, such as reprimand, fines and short detention ranging from five to fifteen days. This pattern in the implementation of public law sanctions, albeit its obvious risk associated with police abuse of power, is unlikely to create strong deterrence against propagators, especially the organized networks that constantly replenish its human resources, lest compensating for the low frequency of

¹⁸⁸ Liu Jun & Ju Jing, *Daji Wangluo Yaoyan Taiqian Muhou* (打击网络谣言台前幕后) [*Front and Back Stages for the Strike Against Internet Rumors*], Nanfang Zhoumo [SOUTHERN WEEKLY] (Sept. 5, 2013), <http://www.infzm.com/content/93974>.

¹⁸⁹ Gong'an Bu Bushu Zhuanxiang Xingdong Daji Zhengzhi Wangluo Yaoyan (公安部部署专项行动整治打击网络谣言) [*Ministry of Public Security Sets Up Special Task Force Targeting Internet Rumoring Activities*], XINHUA NET (Aug. 31, 2015), http://news.xinhuanet.com/legal/2015-08/31/c_128181730.htm.

¹⁹⁰ Hu, *supra* note 169.

enforcement. For indicative data in that regard, from 2003 to 2011, media scholar Zhou Yuqiong counts 219 reported incidents of false internet rumor cases being investigated and prosecuted across the country, and of the 189 cases then concluded 95% of offenders were subjected to public order sanctions and only 5% were prosecuted criminally.¹⁹¹ For another sample collected by legal scholars, Sun Wanhuai and Lu Hengfei collected 80 reported cases from January to October 2013, the year of a harsh wave of enforcement campaign, and they found 73% cases were concluded with public order sanctions and 27% with criminal penalties.¹⁹²

The overwhelming preference of the police authorities for using public order sanctions as opposed to pursuing criminal prosecutions is not difficult to understand from the obvious disparity in cost of the two types of enforcement actions. Under China's applicable criminal statutes, the substantive legal requirements for establishing individual criminal liabilities for falsehoods propagation are in fact not low. For example, the offender typically needs to be found to hold knowledge and intent, instead of mere negligence, with respect to the rumor's factual falsity.¹⁹³ For many criminal offenses applicable to falsehoods activities, there also requires a showing of wide dissemination and damaging impact of the false message. Pursuing criminal cases

¹⁹¹ ZHOU, *SUPRA* NOTE 37 AT 248-249.

¹⁹² Sun Wanhuai & Lu Hengfei (孙万怀、卢恒飞), Xingfa Yingdang Lixing Duidai Wangluo Yaoyan (刑法应当理性对待网络谣言) [*Responding to Internet Rumors Rationally With Criminal Law: An Empirical Assessment of the Judicial Interpretations on Internet Rumor*], Fa Xue (法学) [LEGAL SCIENCE], no.11, 2013, at 3.

¹⁹³ See Wang Qunfang (王群芳), Shangyu Feibang Xingwei Lifa Buzu zhi Fenxi (商誉诽谤行为立法不足之分析) [*Analysis of Deficiencies in Commercial Libel Statutes*], Chinalawinfo, http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=634.

therefore expectedly incur greater institutional cost and efforts, and in Internet-related cases that also involves mandates and resources from relatively high-level authorities to effect intra-agency collaboration and coordination between the criminal investigation section and the internet police section, as well as between police forces across different localities.¹⁹⁴ Moreover, still from the police authorities' perspective, the judicial process necessary for prosecuting criminal cases also considerably burdens them since their primary interests are in maximizing successful enforcement counts with the shortest time and least effort. By virtue of the involvement of prosecutorial and court agencies, as well as defense lawyers and media, greater delays and uncertainties can be safely predicted to arise in criminal cases.

Third, civil liability laws in China are also commonly viewed as ineffective in creating meaningful deterrence against falsehoods propagation. There is again no officially released statistics on relevant cases, and neither do media reports offer as much clue as they do for criminal and administrative sanction cases.¹⁹⁵ Nonetheless,

¹⁹⁴ In a recently publicized case involving food rumors on seaweed product, for example, it is reported that the national police authority mobilized police forces from at least three provinces in order to investigate and catch members of a rumor network; through the investigation the Jinjiang police taskforce reportedly went to at least three different localities. This kind of police resources is obviously unavailable for the vast majority of falsehoods incidents. Gong'an Bu Zhihui Pohuo Suliao Zicai Wangluo Zaoyao Chuanyao Qiaozha An (公安部指挥破获塑料紫菜网络造谣传谣敲诈案) [*Ministry of Public Security Cracks Down On the Case of the Plastic Seaweed Rumor*], Wangluo Weifa Fanzui Jubao Wangzhan (网络违法犯罪举报网站) [INTERNET CRIME REPORTING CENTER] (Jun. 7, 2017), <http://www.cyberpolice.cn/wfjb/html/gzdt/20170607/3994.shtml>.

¹⁹⁵ See e.g. Shouli Weixin Fan Yao An Jian (首例微信反谣案结案) [*The First WeChat Rumor Litigation Concluded*], Zhongguo Ribao (中国日报) [CHINA DAILY] (Dec. 24, 2014), http://cnews.chinadaily.com.cn/2014-12/24/content_19156861_2.htm.

circumstantial considerations suggest that the realistic exposure to civil liabilities of the average Chinese netizens in connection with rumor propagation can only be minuscule. Similar to the public law enforcement context, in pursuing civil liability claims plaintiffs under Chinese law also need to meet the costly burden of proving fault and damages. In addition, till 2014, unlike their U.S. counterparts who may pursue “John Doe” suits, many potential plaintiffs in China were unable to file their cases in civil courts because they are unable to, as the procedural laws required, identify the anonymous online propagators.¹⁹⁶ The meager size of damage awards typically available in China’s civil courts also undermines both a plausible chilling effect and the plaintiffs’ willingness to sue.¹⁹⁷ For cases involving networked falsehoods, the Chinese civil courts are systematically reluctant to grant monetary damages given the difficulty in measuring intangible harms. Instead of calculating damages, the courts in adjudicating personal and business defamation cases more often resort to forcing defendants to make public retractions and/or apologies.¹⁹⁸ In the latest Internet Tort Rules, the Supreme People’s Court formally capped damages for internet defamations at RMB500,000 (roughly equals US\$80,650) for loss of commercial interest unless the

¹⁹⁶ Art. 119 of Minshi Susong Fa (民事诉讼法) [PRC CIVIL PROCEDURAL LAW] (Making “clearly identified defendant” as a prerequisite to filing a complaint).

¹⁹⁷ Civil damage awards granted by Chinese courts are generally not comparable in size with those one see in American courts. What P&G received from an American jury in 2007, for example, is simply unimaginable for any plaintiff in Chinese courts.

¹⁹⁸ Where a defendant refuses to make retraction and apologies set out in the civil judgment against it, a Chinese court in enforcing its judgment will publicize the major contents of the court decision on public newspapers and compel the defendant to foot the bill. *See* Sec. 11 of the Zuigao Renmin Fayuan Guanyu Shenli Mingyu Quan Anjian Ruogan Wenti de Jieshi (最高人民法院关于审理名誉权案件若干问题的解释) [SUPREME PEOPLE’S COURT’S RESPONSES TO SEVERAL QUESTIONS ON ADJUDICATING CASES OF REPUTATIONAL RIGHTS] (1998).

courts are able to ascertain a higher figure,¹⁹⁹ which they rarely do. Financial gains for pushing hand networks and their clients, as one may expect, typically turn out much greater.²⁰⁰

In sum, the low frequency of enforcement and limited size of sanctions, as combined, should imply that China's liability laws do not produce a substantial chilling effect on either the strategic propagators or netizens at large. Revealingly, if we look again at the WeChat disclosure, after years of having these liability laws in place, in 2016 the amount of falsehoods activities on just that one single platform remained massive.²⁰¹

3. Properly locating the risks of liability laws

The foregoing surely does not mean that China's use of liability laws raises no free speech concerns. What it questions, instead, is if the conventional discussions have located its risks and perils in the right places. Although liability laws, as previously analyzed, do not appear to produce a generalized chilling effect among China's netizens at large, there are obviously problematic scenarios as such laws are enforced. First, in some high profile seditious libel cases, political dissidents were prosecuted by Chinese authorities under, among others, falsehoods-related liability laws.²⁰² Second, in

¹⁹⁹ See *supra* note 177, Section 18

²⁰⁰ The pushing hand market in Beijing was reported to gross several hundred millions. *Supra* note 170.

²⁰¹ *Supra* note 186.

²⁰² One well reported type of prosecutions target rights lawyers. See *Zhou Shifeng, Chinese Lawyer, Is Sentenced to 7 Years for Subversion*, NY TIMES (Aug. 4, 2016) https://www.nytimes.com/2016/08/05/world/asia/china-zhou-shifeng-sentence.html?_r=0.

accordance with its expressed interest in keeping influential speakers in check, the government at times carries out targeted enforcement actions against social media celebrities who cross the line, and those campaigns reportedly lead to a temporary yet visible reduction in social media activities by celebrities in general.²⁰³ Third, as several widely reported incidents illustrate, local government officials with ulterior motives from time to time take advantage of the laws' vagueness and overbreadth to prosecute netizens who speak ill of them in order to silence or retaliate against the same.²⁰⁴

Elsewhere those problems are often regarded as illustrations of “chilling effect.” But since the objective here in this Article is to understand in a more precise sense the effect of liability laws in regulating falsehoods, it is useful to distinguish these problematic scenarios from that where well-meaning laws unintentionally deter speakers and their expressions that the laws otherwise did not mean to deter. As we closely consider the three scenarios above, in the first and the second the Chinese government is using the laws to chill the very types of speakers and speeches, as among others, that it has intended for the falsehoods laws to target. While there is no dispute that such constitutes blatant suppression of political dissents, the point here is that since average netizens possess a generally clear understanding of such targeting in government's enforcement of falsehoods laws, they do not feel the same chill from the

²⁰³ GUO, *SUPRA* NOTE 148 at 215-16 (Citing a research report by People.cn that shows that after the round of crackdown on celebrities for spreading rumors on Sina Weibo there was a significant temporary decrease in the number of posts by opinion leaders (24.9% from September 11 to October 10).

²⁰⁴ See Fan Zhengwei (范正伟), Yifa Zhiwang Yao Jingti Waizui Heshang (依法治网要警惕“歪嘴和尚”) [*Stay Alert Against Policy Distortion When Governing the Internet According to Law*], PEOPLE.CN (Sept. 25, 2013), <http://opinion.people.com.cn/n/2013/0925/c1003-23022793.html>.

same laws when carrying on their own online exchanges, including those on political topics. In fact, as a recent research by the Chinese Academy of Social Science reports, in 2016, networked falsehoods of political and public concerns still circulated in greater quantity than falsehoods of any other less sensitive topics.²⁰⁵

The third scenario more closely resembles a chilling effect in its core sense, where more individuals than the laws intended could be deterred from engaging in normatively legitimate and positively legal expressions. But the chilling effect here derives from not the liability laws *per se*, but the abusive behavior of government officials, which the regime in principle does not condone yet fails to control effectively. Such distinction matters, because to the extent that abusive government behavior is the real risk to legitimate speech interest in that scenario, such risk may be controlled without necessarily by doing away all liability laws on networked falsehoods. At least in the Chinese context, both governmental and media channels exist for such cases of abuse to potentially become widely noticed, and subsequent pressures from both public outcries and higher level interventions typically lead to swift correction of prior sanction decisions as well as negative accountability consequences on the relevant local officials.²⁰⁶

²⁰⁵ *SUPRA* NOTE 167 AT 110 (reporting that from April 2015 to March 2016 more than 30% of networked falsehoods circulating on China's Internet are about political and societal public affairs, leading far ahead of those relating to personal health matters, which count about 15%.)

²⁰⁶ For a most recent and highly publicized example in 2018, a former doctor who was accused by a large herbal medicine company for spreading false rumors about such company's product risk was detained by local police authorities from the company's jurisdiction, but was almost immediately released when the media reported on such incident. *See* Bei Kuasheng Zhuabu Yisheng jiang Huijia Lvshi Hongmao

In sum, while the China case does reveal problems of using liabilities laws against falsehoods, these problems may be more properly understood as different from the chilling effect most worry about in conventional free speech context. Properly locating the risks and perils will surely have implications for our further thinking on liability laws.

C. *Censorship's Agency Problem*

Countless popular and scholarly accounts have depicted China's internet censorship regime as the most restrictive and sophisticated in the world.²⁰⁷ Since the initial days of its commercial Internet in the mid-1990s, China has strived for maximum regulability of internet content through a combined strategy of technology and law. Infrastructure-wise, the government through nine backbone ISPs sets up a series of blocking and filtering hardware and software, popularly known as the "Great Firewall" ("GFW"),²⁰⁸ at three international gateways to ensure control over information inflow from overseas sources. Behind the GFW, both large and small providers responsible for nationwide as well as "last mile," local distribution of internet contents are then legally required to carry out blocking and filtering over contents blacklisted by general statutes

Yaojiu Pairen Canyu Zhuabu (被跨省抓捕医生将回家 律师:鸿茅药酒派人参与抓捕) [*Arrested Doctor Will Go Home and Lawyer Noted that Hongmao Yaojiu Took Part in the Operation*], Wangyi Xinwen (网易新闻)[NETEASE NEWS] (Apr. 18, 2018), <http://news.163.com/18/0418/10/DFLSDNEK0001875P.html>.

²⁰⁷ See e.g. Ronald J. Deibert, *The Geopolitics of Internet Control: Censorship, Sovereignty, and Cyberspace*, in ANDREW CHADWICK & PHILIP N. HOWARD EDS., ROUTLEDGE HANDBOOK OF INTERNET POLITICS 323, 327 (2009) ("China is still the world's most notorious and sophisticated censoring regime.").

²⁰⁸ First coined by Wired in 1997. *The Great Firewall of China*, WIRED (Jun. 1997), <https://www.wired.com/1997/06/china-3/1997>.

and specific orders from central and local authorities.²⁰⁹

Without repeating in detail the existing literature on the technological and operational features of China's internet censorship, I focus in this Section on analyzing the often overlooked challenge of agency cost to the system. As demonstrated in the following discussion, the presence of agency problem undercuts the stringency of China's internet censorship practices overall and counterbalances the risk of excessive information loss by virtue of applying censorship to regulating networked falsehoods.

1. Agency problem in media censorship

One over-simplified notion is that omnipotent as the Chinese government censors are, they practically censor any content at will. As institutional practices, however, China's censorship involves much more than a single-minded state actor and the technological capacities it possesses. As Balkin describes in the U.S. context, for example, the government today has to work with or through private owners of technological capabilities and infrastructures to effect censorship as speech regulation.²¹⁰ Regulatory behaviors and outcome, therefore, are highly dependent on incentives embedded in the agency relationship between state and industry actors.

The agency problem has long existed in China's censorship system too. China's internet censorship can be properly viewed as the state's effort to extend and adapt its pre-existing model of media regulation to the Internet.²¹¹ Under the censorship model

²⁰⁹ Henry L. Hu, *The Political Economy of Governing ISPs in China: Perspectives of Net Neutrality and Vertical Integration*, 207 *China Quarterly* 523-524-27 (2011).

²¹⁰ Balkin, *supra* note 73 at 2338.

²¹¹ Hu describes this regulatory logic as pouring new wine into old bottles, *see* Henry

applied to pre-Internet publishers and broadcasters, the state sets up control measures over the full process of information production and dissemination, including a licensing system to limit the scope of persons and entities qualified to produce information for mass dissemination (“licensing”), a screening system to control and restrict publication (“screening”), and a monitoring system to remove unwanted information *post hoc* from public distribution (“removal”).²¹² A major challenge facing a traditional censorship system as such is its high operating cost. While China has long kept in place a costly system of dedicated human censors, such censors alone are still unable to perfectly censor every bit of information produced by media publishers. Intermediary censorship by the publishers themselves is thus indispensable for the system to operate with efficacy, and agency problem inevitably arises with respect to how well the publishers meet the state censor’s expectation at the intermediary level.

Since traditional media are all owned or controlled through shareholding by the government in China, one may expect censors and publishers to work on censorship in a streamlined, seamless process. The reality tells differently. Since the 1980’s, the agency problem in China’s censorship regime has kept growing as the state allows and encourages commercialization and partial privatization of its media sectors.²¹³ While

L. Hu, *Content Regulation*, in ASHLEY ESAREY & RANDOLPH KLUVER ED., *INTERNET IN CHINA: AN ENCYCLOPEDIA HANDBOOK* (2010).

²¹² See e.g. Chuban Guanli Tiaoli (出版管理条例) [REGULATION ON THE ADMINISTRATION OF PUBLICATION] (2016 amend.); Yinxiang Zhipin Guanli Tiaoli (音像制品管理条例) [REGULATIONS ON THE ADMINISTRATION OF AUDIO AND VIDEO PRODUCTS] (2016 amend.); Guangbo Dianshi Guanli Tiaoli (广播电视管理条例) [REGULATIONS ON BROADCASTING AND TELEVISION] (2017 amend.); Dianying Guanli Tiaoli (电影管理条例) [REGULATIONS ON THE ADMINISTRATION OF MOVIES] (2001 amend.).

²¹³ Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal*

a shrinking group of media units at central and local levels continued to operate on direct government funding,²¹⁴ most have thrown themselves into intense competitions for advertising revenue.²¹⁵ From the state censors' perspective, the commercial incentives have made media behaviors much less "reliable." As content censorship continues to apply to the increasingly commercialized media sector, regulatory resources have become strenuous as now there are many actors with incentives to test boundaries. While authorities constantly detect, censor and punish violators of all sorts of content bans, new supplies of darers now seem virtually endless in supply. Media outlets and personalities often compete "at the margin" ("*bo chuwei*"), meaning that many will from time to time try to inch, if only marginally, farther than peers into certain sensitive territories so as to attract attention and viewership. At times, financial interests even transformed some journalists and media into extortionist operations, who extract payments from business firms or wealthy individuals with threats of ill reporting or promises of favorable stories.²¹⁶

2. Agency problem in internet censorship

The rise of the Internet and social media has exacerbated the agency problem facing China's government censors. Compared with sites run by government news agencies, news sites and social media run by private operators are overall much more

System, 105 COLUM. L. REV. 1, 17 (2005).

²¹⁴ *Id.* at 19.

²¹⁵ *Id.* at 23-28.

²¹⁶ See e.g. Gady A. Epstein, *Dark Journalism*, FORBES (Jul. 11, 2008) <http://www.forbes.com/global/2008/0721/018.html> .

popular sources of news among Chinese internet users.²¹⁷ While the technological infrastructure was laid down in the way that allows maximum regulability for the government, short of massive blocking or connectivity shutdowns, which occur only under extreme circumstances,²¹⁸ government censors have had to significantly rely on ISPs and ICPs to monitor the massive quantity of online contents and act on blocking, filtering and removals and takedowns.

Although the government repeatedly attempts to bring up internet media regulation to its classic model of news media censorship,²¹⁹ such attempts have so far proven unsuccessful primarily because the proliferation of user-generated contents makes it impractical to operate meaningful licensing and screening schemes. Even if a real identity registration scheme were to implement successfully, without the private platforms' intermediation, the government would still have little practical chance to directly subject all content producing internet users, in the same way as for the licensed journalists and media agencies, to constant monitoring and censorship.²²⁰

²¹⁷ *Supra* note 167 at 28-29 (Comparing viewership statistics of mainstream news website versus privately owned Internet portals in China in the second half of 2015).

²¹⁸ Such as in the year after the Xinjiang riot in 2008. Chris Hogg, *China Restores Xinjiang Internet*, BBC News (May 14, 2010), <http://news.bbc.co.uk/2/hi/asia-pacific/8682145.stm>.

²¹⁹ In the latest round of such attempts, the Internet regulator imposed a licensing requirement on social media platforms should they engage in providing “news information services.” Provisions for the Administration of Internet News Information Services (2017). These types of rules, issued by state internet regulatory authorities, typically fail because they had no way to enforce the licensing requirements that appear to broadly apply to almost any individual web users who happen to post something that looks like news reporting.

²²⁰ The difficulty has already been present at the very early age of Web 2.0 in China. Jack Linchuan Qiu, *The Internet in China*, in *THE NETWORK SOCIETY* 112-13 (MANUEL CASTELLS ED., 2004).

Compared with traditional media, however, Internet companies' incentives to invest in human and technological capacities for content regulation diverge more from that of government censors. Internet content firms' primary business model is to attract, grow and maintain user base and traffic through maximizing content offerings. Legally required censorship operations are a cost center for them, and associated investments thus should preferably not exceed the minimum necessary, because overzealously or even just dutifully censoring contents may lead to a loss of users to other more daring competitors. Especially for firms at their early stage of development, seeking to boost user growth by all means, they are from time to time observed as willing to take risks and err on the side of not censoring marginal or sometimes "hardcore" censorable contents.²²¹

Critics of China's internet censorship often underestimate or even overlook this dimension of market incentives facing internet firms, and some are inclined to think that firms, following the same logic as traditional media, will always err on over-censorship because it is publication, not over-censorship, that could potentially bring them negative legal ramifications.²²² But as a series of empirical studies aimed at tracking China's internet censorship illustrate, content censorship as practiced at the intermediary level is much more nuanced and delicate.²²³ Among others, findings from

²²¹ *Supra* note 161.

²²² Chander & Lê, *supra* note 112 at 523.

²²³ Tao Zhu, David Phipps, Adam Pridgen, Jediah R. Crandall, and Dan S. Wallach, *The Velocity of Censorship: High-Fidelity Detection of Microblog Post Deletions*, in Proceedings of the 22nd USENIX conference on Security, 2013, <https://www.cs.unm.edu/~crandall/usenix13.pdf>; Yawei Liu & Ying Zhu, *Lost in Transition: A Case Study of Chinese Censorship of the US-China Perception Monitor WeChat Account, and Its Implications*, Chinese Internet Research Conference,

these studies suggest that China's major social media firms, primarily Weibo and WeChat, implement pre-publication automated review filters, the most stringent and efficacious form of keyword censorship, against only a limited set of highly sensitive keywords.²²⁴ Instead, the more prevalent forms of censorship involve retroactive removals only after the published content is identified as censorable.²²⁵ Intermediaries are also found to implement flexible and tiered censorship policies, allowing them to prioritize applying censorship to different subject matters and users at different times.²²⁶ In addition, without conclusive data, findings from these studies strongly indicate that censorship stringency varies across different platforms, with WeChat likely implementing much less stringent censorship than Weibo.²²⁷ While these behaviors may be interpreted in multiple fashions, they all support the conjecture that China's internet firms, in carrying out the state's general mandate for intermediary censorship, are acting in a highly strategic manner to minimize the cost of false positives.²²⁸

To the extent that the government realizes the agency problem, it should not expect to count on internet companies to implement broadly imposed censorship requirements to their fullest extent. Instead, it seems to accept that stringent control may only be achieved for a selective scope of online contents. According to a well-known study with

Edmonton, May 27-28, 2015; Ng, *Politics, Rumors, and Ambiguity*, *supra* note 156.

²²⁴ Predominantly relating to Falun Gong and Tiananmen Square. See Lotus Ruan et al., *One App, Two Systems How WeChat Uses One Censorship Policy in China and Another Internationally*, Citizen Lab (Nov. 30, 2016), <https://citizenlab.org/2016/11/wechat-china-censorship-one-app-two-systems/>.

²²⁵ Ng, *Politics, Rumors, and Ambiguity*, *supra* note 156.

²²⁶ *Id.*

²²⁷ See *supra* note 223.

²²⁸ Tao Zhu et al., *supra* note 223 at section 6.3.

data from a variety of social media sites, political scientists Gary King, Jennifer Pan and Molly Robertson found that all politically critical or sensitive contents are not censored. Instead, censors focus primarily on information that potentially could trigger offline collective unrest or protests.²²⁹ The finding of this pattern in China's censorship operations is consistent with anecdotal observations and local knowledge. Plausible explanations so far offered for such pattern of selective censorship tell a story about how the Chinese government adopts such an approach to maneuver the public information environment in more effective ways.²³⁰ But it is also important to understand that the agency problem in its current form makes censorship practices with a selective and limited scope a pragmatic way to operate the system: Effective cooperation from the companies are much more likely induced if government censors narrow down the required scope, and in particular to such limited types of contents most internet companies do not deem vital to their business model.

3. Agency problem in censoring networked falsehoods

To observe and consider censorship practices in the context of regulating networked falsehoods, therefore, the key question is about whether networked falsehoods fall within the scope of governments' selective focus. As previously noted, China has long identified networked falsehoods as a central challenge to internet governance, and its laws and regulations technically require intermediaries to block

²²⁹ King et al., *supra* note 109; Gary King, Jennifer Pan, and Margaret E. Roberts, *Reverse-engineering Censorship in China: Randomized Experimentation and Participant Observation*, 345 SCIENCE 1 (2014).

²³⁰ *Id.*

false information that is *obviously* seditious, defamatory or deceptive.²³¹ Since the regime's dissidents from time to time resort to disseminating sensationalized messages with half-truth to stir public outcries,²³² the government, in addition to imposing on them harsh punitive sanctions, is keen on moving swiftly with censorship. The internet intermediaries in these situations have least flexibility with respect to compliance because, to start with, the illegality of political rumors are most *obvious* as one reads the statutory language in China's context, and the screening and takedown orders issued by the propaganda departments and internet police authorities also tend to be very specific under these circumstances.

Besides those *obvious*, hardcore political rumors, however, networked falsehoods of a greater range of subject matters are often complained by the public for being under-censored, in particular when they circulate as part of commercial frauds, scams or simply obnoxious viral marketing campaigns. Again, given the sheer quantity of these types of networked falsehoods and their associated problems, the state expects internet companies to take responsibilities in deploying effective censorship tools and protocols. To incentivize intermediaries, China's legal regulation decidedly take the opposite approach to the Section 230 immunity. While in the civil law on intermediary liabilities it appears that China's approach is nothing more radical than the popular "notice and

²³¹ See e.g. Sec. 56 & 61 of Zhonghua Renmin Gonghe Guo Dianxin Tiaoli (中华人民共和国电信条例) [TELECOMMUNICATION REGULATION OF THE PEOPLE'S REPUBLIC OF CHINA];

Sec. 15 & 16 of Hulan Wang Xinxu Fuwu Guanli Banfa (互联网信息服务管理办法) [ADMINISTRATIVE MEASURES FOR INTERNET INFORMATION SERVICES].

²³² Unapologetically, government critics in China had advocated for using rumors to compel the government to disclose truthful information.

take down” requirements, in practice there are a range of administrative measures, such as inspections, reprimands, “invitation-to-talks,” fines, which the governments routinely invoke to give internet companies nudges and pushes.²³³ In most tense situations, when multiple government regulatory agencies launch joint enforcement campaigns against networked falsehoods, deliberate omission in properly censoring contents may lead to the shutdown of small websites and suspension of larger ones.

These oversight and enforcement measures are meaningful incentives, for sure. For even the leading operators that practically face negligible shutdown risks, regular run-ins with government censors could still be costly disruptive.²³⁴ Nevertheless, these measures do not suffice to eliminate the agency problem to the extent that they do not fundamentally align incentives of internet companies with that of the censors. As China’s regulatory experience shows, using censorship to tackle networked falsehoods is essentially a cat-and-mouse game, since as long as the dominant business model for the commercial Internet allows users, sites and push hand networks to profit off hoaxes, false information and sensationalized stories, there will always be new posts and new sites mushrooming in place of those removed and shut down. In particular, as major intermediaries constantly complain, they see themselves unfairly overburdened as being required to lead the battle against organized falsehoods propagators; instead, they

²³³ See *supra* note 231.

²³⁴ A recent well publicized incident involves Baidu, the largest search engine in China, which was placed under investigation by regulators for misleading hospital advertisement that leads to a patient death from medical malpractice. See Fan Zui Fen Zi (饭醉分子), Wangxin Ban Qiantou Diaocha Baidu Wei Zexi Shijian (网信办牵头调查百度“魏则西事件”) [*Internet Authorities Investigates Baidu Over the Wei Ze Xi Incident*], HU XIU (May 2, 2016), <https://www.huxiu.com/article/147316.html>.

argue that authorities with law enforcement power should go directly after the bad actors, not just kick the ball to the intermediaries.²³⁵

Nevertheless, as the internet market evolves, incentives of intermediaries to regulate contents may change too. As more major internet firms have gone through their initial stage of pursuing rapid expansion of user base, and are now transforming into operators of multi-functional platforms, some predict that these firms' strategy will shift to compete over quality content offerings and user experience, and therefore they will have greater incentives to invest in regulating low-quality contents, such as networked falsehoods.²³⁶ Indeed, as consistent with this prediction, in recent years China's major gateway sites and social media have made high-profile moves in developing and deploying a suite of filtering techniques and solutions based on machine-learning and crowdsourcing algorithms are. Both Weibo and WeChat have also started to publicize their achievements in the massive number of takedowns and user account shutdowns.²³⁷ Nonetheless, this is unlikely to mean that intermediary censorship may effectively eliminate the networked falsehoods. On one hand, the risk of negative user reactions and market backlash, potentially triggered by false positives under greater use of automated filters, should continue to caution major platforms to balance their dances and avoid overzealous censorship.²³⁸ On the other hand, so long that China's internet

²³⁵ See *supra* note 169.

²³⁶ Hu Ling (胡凌), *Feifa Xingqi: Lijie Zhongguo Hulan Wang Yanjin de Yige Shijiao* (非法兴起: 理解中国互联网演进的一个视角) [*Rising Illegally: One Way to Understand the Evolution of Internet in China*], *Wenhua Zongheng* (文化纵横) [BEIJING CULTURAL REVIEW], no.5, 2016 at 124-25.

²³⁷ *Supra* note 186.

²³⁸ WeChat, for example, has been subject to particular scrutiny over its censorship practice given its expansion plans for greater adoption by overseas users. See *e.g.*

content market continue to see aggressive fringe players and new entrants, they will continue to provide venues where push hand networks can monetize eyeballs with their click-baits and viral marketing operations.

D. To Make Counter Information Work

1. Government transparency and its limits

Broadly defined, government counter information operations in regulating networked falsehoods are propaganda, and conventional wisdom is that China is particularly good at it. Not foolproof, however, as the government's public communication debacles during the SARS crisis of 2003 embarrassingly expose.²³⁹ Throughout the crisis, the government's information practices have been widely criticized as slow, irresponsible, opaque and misleading,²⁴⁰ contributing to widespread rumors and public anguish as well as chaos in its own epidemic control efforts. One lesson authorities took from this episode is that the old-school propaganda protocol is seriously inadequate for contemporary public communications.²⁴¹ Since censorship works much less than perfectly in keeping the public from seeing unwanted information, including false rumors, the government sees the prominent value of effective communication strategies based on counter information.

Meng Jing & Xie Yuin, *WeChat Global Push Slows As User Growth Plateaus*, CHINA DAILY USA (Mar. 19, 2015) http://usa.chinadaily.com.cn/epaper/2015-03/19/content_19856501.htm.

²³⁹ HOWARD KUNREUTHER & MICHAEL USEEM, *LEARNING FROM CATASTROPHES: STRATEGIES FOR REACTION AND RESPONSE* 193-96 (2010).

²⁴⁰ *ID.*

²⁴¹ ZHENG YONGNIAN, *TECHNOLOGICAL EMPOWERMENT: THE INTERNET, STATE, AND SOCIETY IN CHINA* 155-64 (2007).

In the wake of the SARS crisis, despite persistent red tapes restricting information access at all levels of government and in many areas of government affairs, the Chinese government has made serious efforts towards increasing overall government transparency. A series of legislation and agency regulations have been adopted in order to make the public reasonably informed and updated about a range of safety, health, market and other matters of public concern.²⁴² Specifically, to respond to the ever salient problem of networked falsehoods, the central government repeatedly calls for the establishment of specialized internet public communication capacities, culminating in a set of guidelines by the State Council in 2013 and applicable to all levels of government agencies.²⁴³ The guidelines require government agencies to set up and operate official websites, social media accounts, and other types of interactive interface as well as systematic public opinion monitoring and responses mechanisms. How well local governments maintain and use the relevant information mechanisms are subject to routinized inspections by their superiors.²⁴⁴ National authorities are also keen on eliminating a “digital divide” among different local governments in terms of sophistication in information operations.²⁴⁵ These nationwide reform initiatives have motivated considerable actions on the ground. According to one count, from October

²⁴² *Id.*

²⁴³ Guowuyuan Bangong Ting Guanyu Jin Yibu Jiaqiang Zhengfu Xinxi Gongkai Huiying Shehui Guanqie Tisheng Zhengfu Gongxin Li de Yijian (国务院办公厅关于进一步加强政府信息公开、回应社会关切、提升政府公信力的意见) [*State Council Office's Recommendations on Further Improving Open Government Information in Response to Societal Concerns and to Enhance Government Credibility*] (2013).

²⁴⁴ *Id.*

²⁴⁵ *SUPRA* NOTE 167 AT 213-215 (describing digital divide in terms of governmental publicity operational capacities).

2011 to December 2015, the number of government-sponsored Weibo accounts increased from 18,132 to 152,390; from January 2013 to January 2016 the number of government WeChat public accounts increased from 4,000 to 100,000.²⁴⁶ In 2016, in order to aggregate and coordinate government internet and social media resources for the specific objective of debunking networked falsehoods, the Ministry of Public Security worked with Weibo to set up a “nationwide rumor debunking platform,” on which rumors reported by netizens are to be fact-checked by social media staff from police units in hundreds of localities.²⁴⁷

While the government overhauls its transparency and counter information practices, however, complaints have never ceased to be voiced about the lack of timely and effective public communication from the government, especially during episodes of influential rumors. As the scope, amount, and frequency of information released continue to rise, the Chinese government has come to realize that merely producing information from its own sources is not the full answer to networked falsehoods.²⁴⁸ Not surprisingly, as earlier discussed, the efficacy of government counter information is particularly susceptible to the Brandolini’s law. Moreover, dynamics of cultural

²⁴⁶ *Id.* AT 205-207. See also Jesper Schlæger & Min Jiang, *Official Microblogging and Social Management by Local Governments in China*, 28 CHINA INFORMATION 189 (2014).

²⁴⁷ Shouge Quanguo Piyao Pingtai Tuichu (首个“全国辟谣平台”推出) [*First “National Rumor Debunking Platform” Went Online*], Beijing Qingnian Bao (北京青年报) [BEIJING YOUTH] (May 13, 2016), http://news.xinhuanet.com/tech/2016-05/13/c_128979490.htm.

²⁴⁸ Pan Congwu & Yang Shuhan (潘从武 杨舒涵), Tan Fang: Zhengfu Xinxi Touming Hou Yaoyan Weihe Reng Xiaozhang? (探访：政府信息透明后网络谣言为何仍嚣张?) [*Investigation: Why Internet Rumor Is Still Rampant After the Government Goes Transparent?*], Fazhi Ribao (法制日报) [LEGAL DAILY] (Feb. 22, 2017), <http://www.chinanews.com/sh/2017/02-22/8156407.shtml>.

cognition may also have played a role here: Many falsehoods in China gain traction as a result of distrust among certain groups or on certain subject matters towards government information and narratives.

2. Building a counter information network

To address the deficiency in government counter information operations, China has over time pursued a strategy of mobilizing diverse sources of information and voices. Through these efforts, a government-sponsored network of counter information operations (“counter information network”) has emerged, consisting primarily of an army of astroturfers, supernode personalities, and voluntary and commercial fact checkers.

In forming such a network the Chinese government has ostensibly taken cues from the prevailing practices in the advertising and public relations industry. The communication operations of “astroturfing,” meaning the direction of a large number of speakers to make a specific speech at designated forums so as to sway public opinion, have been commonplace in both online and offline political and commercial campaigns.²⁴⁹ Since the early 2000’s, the Chinese central government has publicly announced its plan to train and deploy “web commentators,” subsequently known as the “fifty-cent party,” who work full time or part time to write and post pro-government messages on government and commercial online forums and social media.²⁵⁰ Many

²⁴⁹ See e.g. James B. Astrachan, *Social Media Marketing: Testimonials and Endorsements the New Transparency and Attorneys’ Ethics*, Md. B.J., November/December 2012; Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201 (2017).

²⁵⁰ CCP Central Office and State Council Office’s Recommendations on Further Strengthening the Management of Internet News Propagation and Internet Content

studies have attempted at getting to the bottom of the “fifty cent party” operations, and different theories are offered about their objectives and effects.²⁵¹ Pertinent to the analysis here, web commentators are mobilized by government agencies in many incidents of influential false rumors, and their tasks are to both disseminate corrective information and to promote positive and calm feelings.²⁵²

Aside from its other controversial aspects, mass astroturfing as used for rumor control purposes face inherent limits in its efficacy. Similar to the average paid trolls hired by commercial marketing or push hands networks, the majority of rank-and-file government web commentators have neither adequate communication skill nor strong incentives to work on it.²⁵³ It should be for precisely that reason did a widely discussed recent study by King et al. find that most astroturfing operations of the Chinese government agencies achieve no greater effect than defensive search engine

Security (2002). Likely due to their oversight of this public document, western observers often thought this practice started in 2004 as a stealth operation when they obtain access to leaked files from the propaganda department of a local government in Jiangxi Province.

²⁵¹ The finding of King et al. suggests, for example, government uses astroturfing through the fifty cent parties to distract, instead of engage, public attention to controversial issues. Gary King, Jennifer Pan, and Margaret E. Roberts, *How the Chinese Government Fabricates Social Media Posts for Strategic Distraction, not Engaged Argument*, 111 AM. POLIT. SCI. REV. 484 (2017).

²⁵² Nianqing Gongwu Yuan: Ge Jiguan Dou You “Wangping Yuan” Bang Zhengfu Piyao (年轻公务员：各机关都有网评员帮政府辟谣) [*Young Civil Servants: All Agencies Have Web Commentators to Debunk Rumors for the Government*], *Zhongguo Qingnian Bao* (中国青年报) [CHINA YOUTH] (Aug. 21, 2013), <https://m.sohu.com/n/403629610/>.

²⁵³ The posts by government astroturfers has been widely found as of utterly low quality. In terms of operational process, one common way propaganda departments at different levels of government mobilize mass astroturfing through issuing orders to government and state-owned enterprise employees and college students to post comments on designated forums in connection with particular events. Not surprisingly, most individuals asked to do this are not interested in devoting more than the minimum copy-and-paste type of efforts, if they really have to do it to report to someone at all.

optimization (“SEO”): Swamping targeted information with massive quantity of alternative or irrelevant contents, without necessarily engaging substantively with the former’s persuasiveness.²⁵⁴ Such defensive SEO has its utility in rumor control, but it does not respond to the public’s need in these situations for authoritative and trusted sources of information. Worse, the massive quantity of generally low-quality posts produced by purportedly clandestine web commentators, who are often being easily spotted by netizens, from time to time has led to further erosion of the government’s credibility.

Instead of relying solely on mass astroturfers, the government has also invested in cultivating and mobilizing social media supernodes, apparently inspired by the success of celebrity personalities in the market. In addition to operating a large number of officially affiliated social media accounts, the state propaganda departments enlist, through various open or discreet arrangements, a range of influential or semi-influential opinion leaders.²⁵⁵ These opinion leaders may or may not have formal government positions, and what they are expected to contribute to online conversations are messages

²⁵⁴ *Supra* note 251. The defensive SEO objective of government’s use of mass astroturfers is widely understood by Chinese netizens, as reflected in the common reference of “low-end 50 centers,” meaning to distinguish what these types of web commentators do from government sponsored opinion leaders (“high-end 50 centers”) further discussed below.

²⁵⁵ See e.g. Guo Jia Wang Xin Ban Yi Fa Ban Hao Wang Zhan Jiang Hao Zhong Guo Gu Shi Zuo Tan Hui Zai Su Zhou Ju Xing (国家网信办“依法办好网站，讲好中国故事”座谈会在苏州举行) [*State Internet Administration Office Held Conference on “Operating Websites According to Law and Telling the China Stories” in Suzhou*], CRI (Nov. 1, 2014) <http://gb.cri.cn/42071/2014/11/01/6651s4750021.htm>; Duoming Weibo Da V Ruwei Wuge Yibai Zheng Nengliang Bangyang Pingxuan (多名微博大V入围五个一百正能量榜样评选) [*Multiple Weibo “Big Vs” Selected As Role Models for Spreading Positive Energy*], People.cn (May 9, 2017), http://www.sohu.com/a/139352074_114731.

that are distinctive in tones from but consistent in substance with official lines.²⁵⁶

Although often accused of being in the same camp with the “fifty-cent party,” these opinion leaders play different roles in the counter information network. Within their respective networks of followers, these opinion leaders are viewed as trusted sources of substantive knowledge and information, not trolls that most simply ignore. One challenge to using opinion leaders in rumor control situations, however, comes from the cyberspace’s fragmentation. Public attitudes of Chinese netizens towards different opinion leaders polarize considerably, and those whose messages are slanted as pro-government lose the appearance of independence easily and consequently ears of those with opposite predispositions.²⁵⁷ In addition, as specialized knowledge and/or time-consuming investigations are from time to time required to produce rebuttal information, media opinion leaders, such as celebrities, are also incapable of supplying contents of expected quality, irrespective of how influential they may be dissemination-wise. In extreme circumstances, low-quality counter information coming from opinion leaders even backfires, underscoring the risks government faces in using them.²⁵⁸

Responding to this further demand for both independence and specialization are

²⁵⁶ *Id.*

²⁵⁷ These opinion leaders often call themselves, in a self-derogatory way, as “self-funded fifty cent partier,” referring obviously to the popular accusations that they make pro-government comments because they receive government funding. *See e.g.* Laobing Bei Feng Zi Gan Wu, Cheng Nianqing Ren Gan Ma Guojia Bu Gan Ma Lingdao (老兵被封“自干五”，称年轻人敢骂国家不敢骂领导) [*Veteran Mocked as “Self Funded Fifty Cent Partier” Thought Young People Dare Only Criticize Government But Not Their Own Superiors At Job*], iFeng Finance (Apr. 9, 2015), http://finance.ifeng.com/a/20150409/13619457_0.shtml.

²⁵⁸ *See e.g.* *China’s President Gives Blogger 15 Minutes of Fame - and Scrutiny*, LA Times (Oct. 22, 2014), <http://www.latimes.com/world/asia/la-fg-china-blogger-awkward-20141022-story.html>.

an increasing number of active fact-checking groups and sites and platforms they operate. Online fact checkers and rumor debunkers in China initially emerged as primarily voluntary, interest-based netizens groups.²⁵⁹ Many individuals involved in online rumor debunking are initially college and graduate students who, in addition to seeing an opportunity for publicity and vanity, genuinely believe that China's cyberspace needs high-quality rebuttals against the rampant falsehoods.²⁶⁰ Initially, members of the loosely organized rumor debunker groups devoted primarily personal time and efforts to doing related research, investigations, and writings without being financially compensated.²⁶¹ Unlike their American counterparts that maintained non-commercial status over the years,²⁶² however, the trajectory of fact-checking and rumor debunking operations in China appears to be towards commercialization.²⁶³ In a most remarkable case of success, Guokr.com, associated with some early movers in online rumor debunking, has fully developed into a vertical social media platform and started lately to experiment with business models of paid contents.²⁶⁴

²⁵⁹ Most notable examples include Guokr.com (<https://www.guokr.com/about/>) and Songshuhui.net (<http://songshuhui.net/about>).

²⁶⁰ One vivid account of how young individuals engage in such media operations, see Evan Osnos, *Angry Youth*, THE NEW YORKER (Jul. 28, 2008) <https://www.newyorker.com/magazine/2008/07/28/angry-youth> .

²⁶¹ See e.g. Yaoyan Zhongjiezhe Jueqi: Zaoyao de Dongdong Zui, Piyao de Pao Duan Tui (谣言终结者崛起) [*The Rise of Rumor Terminators*], Da He Bao (大河报) [BIG RIVER] (Aug.2, 2011) http://newspaper.dahe.cn/dhb/html/2011-08/02/content_556537.htm.

²⁶² See e.g. Snopes.com, <http://www.snopes.com/frequently-asked-questions/>

²⁶³ Take Guokr as example. The site specialized on popular education of science and technology set up a dedicated discussion group to debunking social media rumors in 2011, which contributed significantly to its user traffic and general publicity. Guokr eventually has developed into a platform that offers functionalities such as SNS, MOOCs and e-commerce. See *About Us*, Guokr.com <https://www.guokr.com/about/>.

²⁶⁴ Liu Yanqiu (刘燕秋), Yige Kepu Pingtai de Zhizhuo Shangye Hua Tansuo Guoke Fufei Shequ Neng Cheng Ma? (一个科普平台的执着商业化探索 果壳付费社区能

Seemingly attesting to the well-functioning of the marketplace of ideas, the growth of influence and market for China's private rumor debunking activities are in important ways attributable to the government's overall counter information strategies. First, the government's persistent campaign against false rumors has since early on promoted a normative anti-rumor attitude among at least the majority of netizens. Such social attitude supported the basic incentives for private individuals who engage in fact checking for norm-based esteem. Second, as government formally acknowledges value in the work of fact checkers, it has in recent years subsidized them with favorable media exposure.²⁶⁵ Fact-checkers and rumor debunkers can certainly benefit from more eyeballs this publicity brings to them. Third, and perhaps most importantly, the government's systematic promotion of rumor debunking activities creates a salient focal point that has contributed to further aggregation and coordination of private rumor debunking resources. In recent years, major social media platforms not only have invested in developing their own technological capacities for falsehoods identification and filtering,²⁶⁶ but they also seek to collaborate with private rumor debunkers by offering them application interface, setting up for them special channels and providing technical supports so as to increase the latter's visibility and communication efficacy.²⁶⁷

成吗?) [*Guokr's Persistent Exploration for Commercialization: Can It Pull It Off?*] [*Yi Ge Ke Pu Ping Tai De Zhi Zhuo Shang Ye Hua Tan Suo Guo Ke Fu Fei She Qu Neng Cheng Ma?*], Jiemian.com (May 19, 2017), <http://www.jiemian.com/article/1331741.html>.

²⁶⁵ *Supra* note 255.

²⁶⁶ Tencent WeChat's latest AI-based rumor identification and labeling software, see Tengxun Zhengshi Fabu Piyao Xiao Chengxu (腾讯正式发布辟谣小程序) [*Tencent Formally Releases Rumor Debunker Mini Program*], TECHWEB (Jun. 9, 2017), <http://www.techweb.com.cn/it/2017-06-09/2533391.shtml>.

²⁶⁷ San Jinjinjin (三金金金), Miandui Pianju Hengsheng de Pengyou Quan, Dou Shi

These collaborative initiatives have considerable chance to become sustainable because, while creating significant market opportunities for the smaller rumor debunker sites, they also are consistent with the major platforms' desires to integrate high-quality content providers and improve the user experience. It is important to realize, however, that government's counter-information operations have played important roles in promoting rumor debunking information as a valued type of content that platforms are incentivized to host. Moreover, the subsequent creation of private rumor debunker platforms by Weibo and WeChat also likely took cues from earlier government initiatives in aggregating data, analytic and communication capacities from multiple official media units for rumor debunking purposes.²⁶⁸

3. Counter information network as a propaganda strategy

The Chinese government's propaganda and information operations are often considered as sophisticated yet idiosyncratic. In developing the counter information network as described in the foregoing, China is, in fact, attempting to address some common challenges that any government could face in using counter information as a policy response to networked falsehoods. On one hand, however critical a source of authoritative information, and however transparent its governance model is, no government is capable of single-handedly supplying all necessary counter information.

Shei Zai Bang Weixin Pi Yao (面对骗局横生的朋友圈，都是谁在帮微信辟谣?) [*Who Is Debunking Rumors in WeChat Circles?*], Lei Feng Wang (雷锋网) [LEIPHONE.COM] (Mar. 15, 2016), <https://www.leiphone.com/news/201603/a3EyrByAm4lIXVz2.html>.

²⁶⁸ Government rumor debunking platform, see e.g. Beijing Diqu Wangzhan Lianhe Piyao Pingtai (北京地区网站联合辟谣平台) [*Beijing Websites United Rumor Debunking Platform*], <http://py.qianlong.com/>.

The psychology of persuasion and influence in human social networks, in addition, limits the efficacy of government directed or affiliated communication. On the other hand, to the extent the marketplace of ideas is now embedded in the market of the Internet, the commercial logic of the latter market implies that all incentives are not in place for private actors to adequately and sustainably supply such public good as the high quality and effectively disseminated counter information.

Leveraging the counter information network, the Chinese state has considerably expanded and upgraded its capacities for navigating the complex environment of internet-based communications. It is difficult to systematically measure, at least for now, the efficacy of the counter information network in regulating networked falsehoods. But one may reasonably infer that the insertion of a significant number of counter information nodes into the public communication networks likely helps bridge structural holes that otherwise could have become exploited by falsehood propagators. Moreover, as the counter information network grows in size and its work becomes more salient, it is showing some potentials in fostering changes to the epistemological norms of at least part of China's Internet. Among China's urban young netizen communities, for example, fact-checking has over time become a widely accepted test for one's cyber-literacy and cultural sophistication.²⁶⁹

²⁶⁹ For an illustrative post written by youngsters mocking the older generations' gullibility for networked falsehoods, see Pengyou Quan Fangguo Wo Ba Wo Ma (朋友圈放过我爸我妈) [*WeChat Circle Please Spare My Parents!*], SOHU.COM (Dec. 18, 2016), http://www.sohu.com/a/121916454_480017; Jiang Nan (姜楠), Zhong Lao Nian Ren de Weixin Pengyou Quan Weihe Zhongai Yaoyan he Jitang (中老年人的朋友圈为何钟爱谣言和鸡汤) [*Why WeChat Circles of Senior Citizens Are Filled With Rumors and Chicken Soups for Souls*], THE PAPER (Mar. 14, 2017),

China's counter-information network does not function without frictions and flaws, of course, even from the state's perspective of information control. Glitches in the network's operations, such as the excessive and crude use of astroturfers by local governments and offensive speech or controversies associated with influential supernodes,²⁷⁰ may seriously undermine the credibility for which the network was established. The government's public promotion and endorsement for the various rumor debunking activities may also taint their image of independence among those having a strong prior to government messages.

From a broader perspective of societal interest, however, the less than perfect controllability of the counter information network by the government may be desirable, because it inherently checks the government's use of its newly discovered communication capacities in more manipulative ways. But to the extent liability laws and censorship do not root out most falsehoods, counter information could always meet intense competition for attention from the falsehoods propagators. Therefore, the most problematic downside of active government counter information operations, as observed here in the China case, is its potential to exacerbate the divisiveness of internet discourse. Fundamentally, as previously noted, any society will always find a portion of its members being immune to any kind of corrective information to networked falsehoods, however sophisticated form it may take. Forcing such individuals to

http://www.thepaper.cn/newsDetail_forward_1638377.

²⁷⁰ See e.g. Luo Shuyi (罗竖一), Wu Fatian Fu Jiaoshou Bei Qunou shi Biran de (吴法天副教授被“群殴”是必要的) [*Why Massive Negative Reactions Against Associate Professor Wu Is Inevitable*], PEOPLE.CN (Jul. 13, 2012), <http://star.news.sohu.com/20120713/n348061030.shtml>.

confront with evidence or discourses in contradiction to their prior dispositions, as studies have uncovered, may push them to polarize even further.²⁷¹ Provided that individuals more susceptible to falsehoods were driven into isolated social cliques, they could be at the greater peril of becoming targeted victims of falsehoods propagators.²⁷²

E. Summary

In regulating networked falsehoods, the Chinese state is enforcing its seemingly draconian liability laws far from rigorously, and such laws' chilling effects are felt primarily by a selective and generally identifiable group of speakers and propagators, not average netizens at large. While pervasive and sophisticated, the state's censorship apparatus is inevitably implemented through delegation to intermediaries, and in the networked falsehoods context, agency problem at the level of internet intermediaries considerably buffers the stringency and excessiveness of censorship. As the Chinese government over time explores counter information strategies against networked falsehoods, it mimics, deliberately or not, commercial marketing and public relation practices, and has so far mobilized a network of counter information resources supplemental or alternative to conventional propaganda.

These findings surely have China-specific implications, such as those relating to understanding free speech and authoritarian governance in China, and some of those discussions will be touched upon in the following Part V. The primary objective of this

²⁷¹ SUNSTEIN, #REPUBLIC, *SUPRA* NOTE 5.

²⁷² Most tellingly, such risk is now illustrated by the predilections of China's senior citizens who are systematically and disproportionately preyed upon by internet scammers. *See supra* note 269.

study, however, is not to assess or argue about the China-specific implications *per se*. While findings here reveal shortcomings in conventional thinking and narratives about China's speech regulation regime, they are not meant to dispute the basic observations about its inherently repressive aspects. More normatively minded commentators on internet free speech in China could certainly opt to interpret discussions here as glass half full or empty with their own benchmarks. My goal here is not to settle such normative disagreements in either way.

This Article's focus, instead, is to use the China case as a comparative and empirical context, in which lawyers may reflect critically on the conventional free speech concerns in the general legal discourse over networked falsehoods as the problem now poses challenges globally. The distance between the political and legal premises of China and those of the United States and other liberal democracies is apparently vast. But in pursuing its multi-layered and interlinked regulatory strategies, China has attempted to strike a difficult balance among its deeply intertwined interests in political control, rational and effective governance, and social and economic development. That, in turn, subjects China to some very similar tradeoffs in legal regulation that Western governments often wrestle with, however differently each side in their respective political context defines regulatory benefits and cost.²⁷³ In that way, the China case has significant comparative and illustrative value, as it offers insights on the general institutional logic, behaviors, and consequences in relation to a government's use of

²⁷³ *Cf.* Qiu, *supra* note 220 at 102 (noting that it is difficult to operationally define the boundary between politics and economy in the Chinese government's sponsorship for the commercial internet).

legal regulation to address such and other modern information problems.

V. IMPLICATIONS

This Part V discusses two sets of implications from the China case that may be useful for lawyers and policymakers in advancing the conversation on regulating networked falsehoods. First, regulatory forces other than formal legal institutions have a significant impact on the outcome of legal regulation, including and in particular how risks of legal regulation identified in conventional free speech discourses materialize as a practical matter. Second, in the age of internet-based communications, legal regulation still has plausible roles to play in addressing Internet governance challenges such as networked falsehoods, but its roles may have evolved and need be reoriented.

Admittedly, like its predecessors, this Article continues to fall short of offering a comprehensive proposal for an optimal regulatory strategy against networked falsehoods. The key contribution this Article aims to make, instead, is to better understand what has been attempted and to further reflect on where to place hopes and fears about legal regulation.

A. Free Speech Concerns, Law, and Other Regulatory Forces

Now that the U.S. legal system faces increasing pressure to figure out what to do about networked falsehoods, China's regulatory experiences are yet most likely considered as a cautionary tale against the temptation of speech regulation. In particular, witnessing the hostile stance the Trump administration takes on the press, American free speech liberals consider legal regulation of networked falsehoods in the current political environment as only bringing about greater dangers to free speech by way of

draconian chilling effects, excessive censorship, and manipulative propaganda.²⁷⁴

But these concerns about how wrong things could go when speech regulation deviates from the libertarian default of minimum intervention can be allayed, as opposed to exacerbated, if lawyers and legal scholars look closely into the China case. More specifically, as noted, that American free speech law focuses so much on exceptionally strong constitutional safeguards, such as categorical norms and overbreadth and vagueness doctrines, is primarily to ensure regulation of networked falsehoods does not significantly reduce or eliminate breathing space for legitimate expression.²⁷⁵ The China case illustrates, however, that even in a regime with more restrictive legal regulation and much less protective institutions for free speech, breathing space for vibrant online public discourses will remain to an extent that is meaningful, albeit not ideal.

Students of Internet speech in China typically do not deny the existence of such breathing space, but many view it as an *ad hoc* state of things. Citing well-known incidents of the regime's iron-fist repression and blatant censorship, Rebecca McKinnon argues, for example, that given the lack of basic constitutional guarantees China's cyberspace as a venue for public discourses is completely at the whim of the government's fluctuating level of tolerance.²⁷⁶ Indeed, the Chinese government as commonly observed tightens and loosens its grip on internet speech as time and context

²⁷⁴ Michael Dorf, *Fake News, Facebook, and Free Speech*, Dorf on Law (Dec. 29, 2016) <http://www.dorfonlaw.org/2016/12/fake-news-facebook-and-free-speech.html>

²⁷⁵ See Gertz, *supra* note 61 (noting that free speech requires courts [to] “protect some falsehood in order to protect speech that matters”)

²⁷⁶ MCKINNON, *SUPRA* NOTE 155.

changes. But what's often overlooked by observers such as McKinnon is that the Chinese state's behaviors in regulating internet information, such as networked falsehoods, are not without powerful constraints, even though the same does not necessarily come from formal constitutional or legal institutions.

While the case study of the last Part IV has already included discussions in the same spirit, in this Part I analyze and discuss these constraining forces and their implications under a more generalizable theoretical framework. In theorizing about regulation in cyberspace, Lessig famously elaborated that forces (or "modalities" in his term) other than laws made by legislatures and courts play important roles in effecting the regulatory outcome.²⁷⁷ Such regulatory forces, as Lessig identifies, include primarily market and commerce, technological architecture, and social norms.²⁷⁸ For example, although how well an individual may exercise her right to speech depends certainly on the robustness of applicable rules of constitutional law, such as the first amendment, it is also affected by how much media publicity she can afford (market), how likely her neighbors will shun her for advocating unpopular ideas (norm), and whether access to physical or virtual forum for speech is practically available (architecture).²⁷⁹ Moreover, the non-legal regulatory forces and authoritative laws do not operate in isolation but interact with each other. While American constitutional laws purport to stringently protect speech, as Lessig incisively points out, other forces may work against the law's intended effect of protection.²⁸⁰

²⁷⁷ LESSIG, *SUPRA* NOTE 9 AT 234-235.

²⁷⁸ *Id.*

²⁷⁹ LESSIG, *SUPRA* NOTE 9 AT 235.

²⁸⁰ *Id.* at 235-36. Balkin similarly points out that first amendment jurisprudence

Using Lessig's framework to consider China's regulatory experiences with networked falsehoods, we may find that the inverse turns out to hold true as well: Where formal legal institutions are weak in protecting speech and controlling government abuse, the forces of market, norm and technology nevertheless can shape regulatory behaviors and consequently preserve a breathing space for online expression that is greater than we otherwise may expect from a legal-centric perspective. For the most critical factors, first, developments in both the internet communication technology and the commercial internet market have constrained the Chinese state from more generally enforcing its restrictive legal regulation in a stringent fashion. As earlier described, the rapidly growing internet and social media market, with its associated massive user activities in speech and dissemination, has made it simply impracticable for public law prosecutions and civil litigations to be imposed rigorously enough to produce a strong chilling effect on netizens overall. For the very same reason, the state's censorship agenda inevitably has to rely on intermediaries to implement as a practical matter, leading to the agency problem and the more balanced approach to content censorship as being carried out at the level of internet intermediaries.

Second, market forces also create incentives for the Chinese state to practice self-restraint as it pursues control over internet speech. As China's developmental state aspires for a world-leading ICT sector to keep driving economic growth,²⁸¹ it is obvious that the value of ICT infrastructure highly correlates with content and services

towering in the age of Sullivan and Pentagon papers have declined in the digital area as a result of technology and market practices. Balkin, *supra* note 73 at 2296.

²⁸¹ See generally Qiu, *supra* note 220 at 100-102, 106-109; HONG, *SUPRA* NOTE 162.

it carries. For any government interested in maximizing its investment returns, it necessarily has incentives to limit the disruptive impact and spillover cost excessive content regulation could impose on the ICT sector and the economy at large. For one further telling example for such incentives, consider China's regulatory approach to the use of virtual private network ("VPN") services. VPN services have long been used by foreign business firms, universities and private internet users to bypass the GFW for access to blocked sites.²⁸² Meanwhile, dissidents also use VPN to spread anti-regime messages within and outside of China, many of which fall squarely within the legal definition of rumors and falsehoods. The Chinese government would have chosen to shut down VPN completely if its singular motive were to eliminate all access to potentially damaging contents. Instead, as of this writing, under the state's censorship system, the use of licensed domestic VPNs is permitted, and unlicensed domestic VPNs and foreign VPNs for the most time acquiesced, although subject to intermittent disruptions.²⁸³ Despite bearing an inevitable cost of false negatives to its objectives in access blocking, the regime in taking such an approach is understood as trying to avoid excessive disruptions of cross-border data flow²⁸⁴ and to entertain demands for

²⁸² *China's scary lesson to the world: Censoring the Internet works*, WASH. PO. (May 23, 2016) https://www.washingtonpost.com/world/asia_pacific/chinas-scary-lesson-to-the-world-censoring-the-internet-works/2016/05/23/413afe78-fff3-11e5-8bb1-f124a43f84dc_story.html.

²⁸³ The most stringent measures China has taken so far is its formal measure in January 2017 requiring shutting down unlicensed VPN services hosted by domestic ISPs. In the second half of 2017, there has been many reported VPN shutdowns, and the market was generally worried that VPN could be gone completely. However, even during the week of October when the Party Congress was in session, there were still VPN services accessible to ordinary consumers that operate without disruption.

²⁸⁴ All data flow through VPN networks can be blocked, technically speaking. However, depending on the different encryption protocols used, for some VPNs the data packets flowing through them may not be decrypted by censors, making it often

information from those economically, culturally and technically resourceful.

Third, norm-based collective actions and communication strategies among netizens may effectively limit the actual magnitude of presumed negative effects resulting from legal regulation. For example, while censorship is typically presumed to result in significant loss of information in public discourse, such loss is often ameliorated by netizens' collaborative strategies to cope with and evade censorship practices. In China's cyberspace, while the character-based Chinese language is known for being difficult to censor, the stringency of censorship is further undercut by Chinese netizens' prevalent use of "code language,"²⁸⁵ which enables communication that in their ordinary forms would have otherwise been censored to take place with apparently innocuous euphemisms in substitution.²⁸⁶ The prevalent and collective use of a constantly evolving code language by China's netizens, in particular those young and active, has thus far considerably undermined censorship efficacy, allowing expressions and discourses on virtually all kinds of sensitive topics.²⁸⁷

While these non-legal regulatory forces, as illustrated, practically buffer the restrictive effect of China's legal regulation, one could counter that it is, by all means, unjustifiably burdensome for free speech if people have to resort to VPNs and code

difficult for censors to determine the legality of the underlying data being transmitted, which often resulting in under censorship. That said, it is reported that censors sometimes make blocking decisions based on unusually large flow of data transmitted through a particular VPN, without necessarily decrypting the data.

²⁸⁵ A compilation and explanation of the most popular codes for western audience, see PERRY LINK AND XIAO QIANG, INTRODUCTION: CHINA AT THE TIPPING POINT? IN *DECODING THE CHINESE INTERNET: A GLOSSARY OF POLITICAL SLANG* (2015 EDITION).

²⁸⁶ *Id.*

²⁸⁷ *Id.* Including Falun Gong and Tiananmen Square, the most consistent keywords on the censorship blacklists across different times.

language so as to engage in communications and expressions on matters of public interest.²⁸⁸ There is no dispute with such and similar normative contentions as a matter of principle. But the point being made here is that a more nuanced and practical analysis of legal regulation must take into account the non-legal regulatory forces so as to properly understand and assess the actual nature and magnitude of the law's cost and benefit.

For example, in a thoughtful and constructive proposal, Derek Bambauer suggests that the legitimacy of different censorship practices be assessed with a more value-neutral framework, focusing on whether the relevant process may ensure openness, transparency, narrowness, and accountability in the operation of a particular censorship system.²⁸⁹ While Bambauer's framework is not exactly one of legal centrism,²⁹⁰ in applying a normative framework like this one's conclusion could turn out quite differently depending on how open-minded she is when looking beyond the formal legal institutions and processes. To analyze China's censorship with this framework, for example, the state's formal institutions seem to fail easily by all these metrics.²⁹¹ But by observing the common patterns in interactions between China's censorship and its embedded market and norms, one may in fact plausibly conclude that the existence

²⁸⁸ Druzin & Li, *supra* note 174 at 381-87.

²⁸⁹ See Bambauer, *supra* note 103 at 390-410.

²⁹⁰ For example the prongs of transparency and the narrowness (how closely does empirical data about what a country actually blocks match the government's description of its censorship?). *Id.*

²⁹¹ Bambauer assessed China against some, but not all of the four metrics. *See id.* Also, in discussing transparency Bambauer indeed paid attention to the market force, i.e. decisions by some commercial search engines to disclose censorship. *Id.* at 394.

and scope of internet censorship have long been a common knowledge in China;²⁹² that through years of interacting with censorship on commercial platforms many netizens, even without explicit notification from sites and providers, are well capable of understanding whether or when censorship takes place;²⁹³ that content being censored are not necessarily over-inclusive in such sense that more than what authorities intended are being censored;²⁹⁴ and that reactions, disobedience, and protests from the public to different extents and in different ways are taken into account by the authorities.²⁹⁵

The point here, again, is not to legitimize China's censorship practices or to raise issues with Bambauer's framework *per se*. Instead, the general lesson is that reconsidering speech regulation through some less legal-centric perspective is critical for advancing legal discourses on networked falsehoods and other internet speech problems. In particular, for American free speech theories, the basic model presumes that individual citizens and journalists as speakers and their expressions are in need of highest legal protection or over-protection because the so-called "risk-reward imbalance" makes them easily chilled by even a slight prospect of negative legal consequences.²⁹⁶ For networked falsehoods and similar problems in the context of

²⁹² One obvious oversight in Bambauer's China specific analysis is that he thinks China does not admit that it censors Internet based on reports about talks given by certain officials who apparently were not sticking to the most standard line. *Id.* at 391-92. In fact, as Qiu pointed out earlier, the Chinese government simply takes "censorship" and "regulation" as interchangeable terms for the same thing, and it has never been shy about announcing its intent to "powerfully regulate" the internet. *See* Qiu, *supra* note 220 at 110.

²⁹³ The popular euphemism for censorship taking place against a particular piece of content or a site is that such content or site gets "404'ed."

²⁹⁴ *See supra* Part III.C.

²⁹⁵ *See supra* note 153 (reporting on the well known Yang Hui case that illustrates how public reactions checked authorities' abuse of censorship power)

²⁹⁶ *Wieman v. Updegraff*, 344 U.S. 183 (1952) (Frankfurter J. concurring).

today's commercial Internet, however, similar assumptions no longer hold true. While legal risks for both speakers and intermediaries, as a practical matter, become significantly limited by market and technological forces, commercial rewards meanwhile are abundant and more than compensating such risks. In more general terms, despite all its vice and flaws, the commercial internet does not "break" so easily, and it operates as a powerful source of incentives to counter and limit the effect of legal interventions.

From the perspective of U.S. law, the foregoing implies that there exists greater room for trial and error in the legal regulation of networked falsehoods than often perceived. As various U.S. courts in recent years began to show greater sympathies for plaintiffs' attempts to circumvent Section 230 immunity in cases against internet platforms, scholars and advocates have renewed strong and blanket objections to judicial workarounds of a statute viewed as the foundation of Internet freedom.²⁹⁷ Nevertheless, for anyone witnessing China's thriving commercial internet industry that is subject to rather stringent content regulation, it begs serious questions if American firms or vibrant public communications will be unjustifiably burdened provided, for example, the law simply changes to allow individuals or firms to seek injunction against intermediaries to take down false information *after* such individuals first obtain liability judgment in court.²⁹⁸

("[I]nhibition of freedom of thought, and of action upon thought, in the case of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.").

²⁹⁷ See e.g. Chander & Lê, *supra* note 112.

²⁹⁸ Rebecca Tushnet raised this question, *supra* note 69 at 128-29.

Importantly, although I argue that “breathing space” for speech and expression is often preserved by not only formal legal institutions but also non-legal forces that constrain regulatory behaviors, that is not meant to deny the value of formal guarantees. The notorious incidents of abusive prosecutions, over-zealous censorship and dishonest propaganda in China surely are attributable to the lack of strong constitutional norms and institutions. However, as we consider the China case’s implication at a general level, it is important to realize that in liberal democracies risks of abusive government behaviors are controlled through a full suite of check-and-balance, transparency and accountability institutions, including a review of government behavior by an independent judiciary. No matter how worried or disillusioned one becomes with these institutions, it is neither necessary nor realistic to place all hope for legitimate and rational governance in a singular libertarian free speech law that is categorically hostile to speech regulation.

B. Old School Regulation, New School Regulation, and the Expressive Functions of Law

Even if concerns over its dangers to free speech can be alleviated, any proposal for legal regulation, as noted, will continue to face strong skepticism about whether a more interventionist approach actually works in addressing the networked falsehoods problem. Indeed, one intuitive lesson to draw from China’s experiences of exploring thus far a multiplicity of regulatory strategies seems to be that there is no regulatory silver bullet to this problem at all. But although any search for optimal legal responses, at least for the moment, is most likely futile, what the China case illustrates are plausible

roles legal regulation could play as part of a society's response to the networked falsehoods problem. Drawing on Balkin's recent paradigmatic analysis of internet speech regulation, this Section provides a preliminary functional discussion of such roles of the law, with a view to advancing our understanding of not only extant experiences but also the possible future trajectory of legal regulation.

Cyberlaw theories have long noticed the paradigmatic shifts in speech regulation as the Internet rises to become the primary communication infrastructure. In an incisive account of this trend in the U.S. context, Balkin describes how "old school" speech regulation, such as liability laws and court injunctions, has now become difficult and ineffective, and consequently the state increasingly resorts to a range of "new school" techniques that allow it to work through or collaborate with private owners of not only the internet communications infrastructure but also the blocking and filtering capacities. In particular, under the "new school" paradigm, the state seeks to "collaterally" deter and censor targeted speakers and expressions through inducing self-regulatory actions from internet intermediaries.²⁹⁹ This new paradigm of speech regulation, as Balkin warns, offers the state advantages of not only high pervasiveness and efficacy but also low salience and chance for public scrutiny.³⁰⁰

While Balkin's analysis of the "old versus new school" speech regulation sheds important light on the current topic, the China case, in turn, provides illuminating points of reflection for this line of theoretical discourse. At a general level, China's regulatory

²⁹⁹ Balkin, *supra* note 73 at 2308-14.

³⁰⁰ *Id.* at 2340-41.

experiences on networked falsehoods are consistent with Balkin's description about the decline of old school and the rise of new school techniques. But as the China case illustrates, one critical assumption Balkin may have made too quickly is that the merger of speech and regulation infrastructure in internet communications almost in itself suffices to facilitate close collaboration between the state and the industry.³⁰¹ In fact, even though the state in China technically owns a significant portion of the internet infrastructure, it is still unable to take it for granted that all ISPs, ICPs and other market participants devote adequate resources to content regulation. In particular, in the context of networked falsehoods where greater leeway exists for a divergent approach to defining the regulatory scope than that of, say, intellectual property infringements, intermediaries' incentives and associated agency problems could pose observable challenges to regulatory efficacy even under the new paradigm. Indeed, so long as the click and traffic based advertising model continues to prevail on a significant portion of the internet and social media markets, the intermediaries' incentives on the issue of content regulation could be even more aligned with that of falsehoods propagators as opposed to that of the regulators.³⁰²

Therefore, the actual mechanisms through which the state aligns incentives and induces private regulatory actions under the new paradigm deserve closer consideration. That, in turn, provides a critical angle for us to observe and understand the practical and dynamic functions of law. Most intuitively, to force collateral regulation, laws imposing

³⁰¹ *Id.* at 2297.

³⁰² *Id.* at 2298.

direct command and control and liabilities upon intermediaries can certainly create incentives. Even though internet intermediaries in the United States have faced similar critiques from both the government and the public for not adequately regulating falsehoods propagation, potential threats of legal ramifications have still obviously induced major Chinese firms to make an ostensibly greater investment in the relevant self-regulation than their U.S. counterparts behind the shield of Section 230. Some self-regulatory actions Chinese firms have started to take against falsehoods and their propagators since early on, such as developing and deploying specialized automation review filters, enlisting third-party fact-checkers to help identify and label false stories, have now become what U.S. firms such as Facebook and Google are turning to.³⁰³

But besides such readily understandable tools of control and deterrence, there are other mechanisms through which China uses legal regulation to mobilize collateral regulation or non-state regulatory resources. Specifically, as earlier discussion suggests, the Chinese government has used the law for its expressive functions in ways similar to those analyzed by social norm theorists such as Sunstein, Lessig and Richard McAdams.³⁰⁴ First, the state's persistent use of the old school techniques, such as the

³⁰³ *How China's highly censored WeChat and Weibo fight fake news ... and other controversial content*, SCMP (Dec. 16, 2016), <http://www.scmp.com/news/china/policies-politics/article/2055179/what-facebook-can-learn-chinas-wechat-and-weibo-how> (pointing out that features rolled out by Facebook in the wake of the fake news controversy in 2016 weren't new to Chinese netizens). *See also* *Facebook wants to use artificial intelligence to block terrorists online*, WASH. PO. (Jun. 15, 2017) https://www.washingtonpost.com/news/the-switch/wp/2017/06/15/facebook-wants-to-use-artificial-intelligence-to-block-terrorists-online/?utm_term=.e71385aa6813&wpisrc=nl_rainbow&wpmm=1.

³⁰⁴ Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); RICHARD MCADAMS, *THE EXPRESSIVE POWERS OF LAW* (2015).

low frequency but high salience prosecutions against individual speakers and the sweeping propaganda about its achievements in deleting harmful false rumors, has over time worked to create and reinforce a powerful stigma, or a negative social meaning, on rumors and unverified information. Such negative social meaning is what makes it ever practicable for major platforms to design and utilize the prevailing crowdsource mechanisms that identify falsehoods based on user reports. It also facilitates the emergence of esteem-conferring norms that incentivize individuals and voluntary organizations to participate in fact-checking and rumor debunking activities.

Second, through constant legal threats, periodical enforcement campaigns and anti-rumor propaganda, the state has deliberately created a very salient focal point that helps channel and aggregate many otherwise isolated and inadequately motivated self-regulatory actions. Market players such as intermediary platforms opt to make a much-publicized investment in rumor rebuttal operations, which serve them as a convenient signal to the authorities about their compliance with the regulatory regime. The investments from major intermediaries, in turn, contribute significantly to the rise of market opportunities necessary to sustain the operations of both smaller developers of content filtering technologies and dedicated, non-governmental fact checkers.

These more nuanced, expressive uses of legal regulation surely do not guarantee greater efficacy. But the key implication here is about functional connections between the old school and new school regulatory techniques. Balkin's dichotomy may create the impression that the old school laws, as becoming obsolete for regulating internet content, will eventually become replaced. The China case demonstrates, more precisely,

that old school tools could well remain in the picture, and what's being reset now and in the future is the state's expectation for their functions as they transform into an integral part of a more complex regulatory paradigm.

Skeptics may certainly raise questions about whether the above observations from China applies equally to the U.S. and other western contexts. Indeed, there are both institutional and philosophical reasons for the state in Western Democracies to try much harder than its Chinese counterpart to minimize the use of conventional legal tools that readily trigger constitutionality reviews and public resentments. But for networked falsehoods as a general problem, since similar types of specifically formulated "soft power," which are often used in national security contexts, are not equally available,³⁰⁵ it is not unimaginable that liberal democracies may follow a similar path to revive some old approaches and use them in more strategic manners. In European countries, which typically take a less absolutist stance on free speech issues, legislatures and executives have moved towards stricter legal commands on internet intermediaries about content regulation.³⁰⁶ In the United States, the late moves by firms such as Google and Facebook have also revealed that it is pressures of at least a semi-political nature,³⁰⁷ as

³⁰⁵ For example, the US government is unlikely to write letters to Google and Facebook to ask to *generally* deal with the falsehoods problems on their platforms in the way it asks Amazon to specifically take down WikiLeaks' website based on specifically formulated national security rationales. Balkin, *supra* note 73 at 2327–29.

³⁰⁶ Anya Schiffrin, *How Europe Fights Fake News*, Colum. Journalism Rev. (Oct. 26, 2017) <https://www.cjr.org/watchdog/europe-fights-fake-news-facebook-twitter-google.php>.

³⁰⁷ Or in the case of Facebook, in the fully political nature. See Tony Romm, *Facebook's Zuckerberg just survived 10 hours of questioning by Congress*, WASH. PO. (Apr. 11, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/11/zuckerberg-facebook-hearing-congress-house-testimony/?utm_term=.4d8dcc3e1ee7.

opposed to the ordinary market reputation concerns, that has a realistic chance of inducing seriously intended self-regulatory actions, their uncertain efficacy notwithstanding. Provided that the market and industry continue to fall short of offering solutions to the public's satisfaction, more institutionalized public intervention to induce actions are possible to emerge even in the United States, perhaps through formal judicial and/or legislative cutbacks on Section 230.³⁰⁸

There are certainly many ways to normatively assess this possible trajectory. Through the lens offered in Balkin's analysis, a potential comeback of the more stern-faced regulatory approach, carrying perhaps new expectations, has yet its virtue in offering greater transparency. Indeed, as again a rather extreme comparative point here, the China case illustrates that as the state uses salient legal regulation for purposes such as deterrence and mobilization, these actions also transmit much information about the state's intent and goals to netizens, which they often use to formulate their own coping strategies in acquiring information and effecting communications.³⁰⁹ In a similar spirit, the greater involvement of formal institutions in liberal democracies, such as the legislative process and the court proceedings, associated with the use of the old school

³⁰⁸ An summary of recent related court and legislative development, see Eric Goldman, *Ten Worst Section 230 Rulings of 2016 (Plus the Five Best)*, Technology & Marketing Law Blog (Jan.4, 2017), <http://blog.ericgoldman.org/archives/2017/01/ten-worst-section-230-rulings-of-2016-plus-the-five-best.htm>; Eric Goldman, *Senate Passes 'Worst of Both Worlds FOSTA'*, Technology & Marketing Law Blog (March 22, 2018), <https://blog.ericgoldman.org/archives/2018/03/senate-passes-worst-of-both-worlds-fosta-linkwrap.htm>.

³⁰⁹ For a further example, unlike what western observers sometimes contend, the government's use of 50c party members is not effective in the sense of confusing general netizens, because such use is quite transparent in the sense that the government openly encourages and orders it, and that Chinese netizens typically find little difficulties in intuitively telling a 50c party post, despite a tendency for false positives.

regulation, may bring back greater openness and transparency to speech regulation which Balkin worries are lost under the new regulatory paradigms. If that is the case, as the networked falsehoods debates carry on, it is at least advisable that lawyers be more open-minded towards proposals for formal institutional reactions before dismissing it as futile and illegitimate too quickly.

VI. CONCLUSION

This Article contributes to the research on a topic that is still nascent in legal literature but is increasingly drawing interests.³¹⁰ Through a case study on China, this Article aims to advance lawyers' general understanding of how legal regulation works in practice as an institutional response to the problem of networked falsehoods, and critically consider conventional free speech concerns that have thus far prevented progress in relevant legal discourse.

The case study finds that, unlike most commonly presumed, in regulating networked falsehoods, the Chinese state is enforcing its seemingly draconian liability laws far from rigorously, and such laws' chilling effects are felt primarily by a selective and generally identifiable group of speakers and propagators as opposed to average netizens at large. While pervasive and sophisticated, the state's censorship apparatus is inevitably being implemented through delegation to intermediaries, and in the networked falsehoods context, the agency problem at the level of internet intermediaries considerably buffers the stringency and excessiveness of censorship.

³¹⁰ TOM NICHOLS, *THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS* (2017).

And as the Chinese government over time explores counter information strategies against networked falsehoods, it has increasingly relied upon mobilizing a network of counter information resources supplemental or alternative to conventional propaganda.

These findings enrich academic understandings of the practical dynamics in free speech, information policy and Internet governance in the authoritarian regimes of China and beyond. Moreover, this Article argues that American lawyers and policy analysts may draw at least two sets of implications for their thinking about regulating networked falsehoods at home. First, regulatory forces other than formal legal institutions have a significant impact on the outcome of legal regulation, including and in particular about how free speech risks of legal regulation materialize as a practical matter. Second, in the age of Internet-based communications, legal regulation may still have a plausible role to play in addressing information governance challenges such as networked falsehoods, but its role may have evolved and as a result need be reoriented as the critical force for coordinating diversely sourced regulatory responses.

CHAPTER THREE

TOWARD A REPUTATION STATE: THE SOCIAL CREDIT SYSTEM PROJECT OF CHINA

I. INTRODUCTION

The reputation revolution, brought upon us by the Big Tech almost two decades ago,¹ is now venturing into the Big Gov. Unbeknownst to most, however, nowadays blazing trails at the movement's very forefront are such unlikely pioneers as local officials from China's southwestern backcountries. Not even many Chinese people have ever heard of Qingzhen, a predominantly rural locality right by the provincial capital of Guizhou, one of China's least developed inland provinces. Fewer would expect to learn that government authorities there, since 2009, have audaciously pushed for a conceptually radical expansion of reputation tracking and analytics. Officially named as "Honest Qingzhen," this ambitious local policy project has its central focus on government's systematic use of ranking, scoring and similar reputation mechanisms upon villagers, rural households, and small agri-business organizations.² The city government, as it envisions in its own policy documents, has sought to link such routine

¹ See Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1670-71 (2008).

² Qingzhen Shi: Liuwei Yiti Dazao Chengxin Qingzhen (清镇市：“六位一体”打造诚信清镇) [*Honest Qingzhen Built from Six Angles*], Renmin Wang(人民网) [PEOPLE.CN], <http://expo.people.com.cn/GB/n1/2016/0708/c403808-28536852.html>; Guizhou Qingzhen Shi Chengxin Nongmin Jianshe Chengxiao Xianzhu (贵州清镇市诚信农民建设成效显著) [Prominent Results Have Been Achieved through the Honest Farmer Project in Qingzhen, Guizhou], Zhongguo Wenming Wang (中国文明网) [CHINA CIVILIZATION] (Mar. 27), http://www.wenming.cn/syjj/dfcz/gz/201503/t20150327_2527223.shtm.

government decisions as distributing subsidies and incentives, processing licensing applications, and imposing administrative sanctions to the “credit level” of individuals and local business, which is evaluated according to a schedule that consists of more than 1,000 rules of scoring.³ These initiatives, boasts the local propaganda, have by far brought to Qingzhen such positive changes as an increase in GDP, residential income, flow of investment, an improvement in social order and “harmony.”⁴ Encouraged as such, Qingzhen officials further announced in 2017 that it planned to take “Honest Qingzhen” to the next level with a major technological upgrade featuring blockchain-based data structure and applications.⁵

Does reputation in fact promise such a powerful tool of socio-economic governance? While a general enthusiasm towards the reputation revolution is already grounded in the theoretical literature,⁶ skepticism would easily arise, however, had the

³ Appendix to Qingzhen Shi Cehngxin (Xinyong) Xinxi Guanli Banfa (清镇市诚信(信用)信息管理办法) [QINGZHEN CITY PROVISIONS ON THE ADMINISTRATION OF HONEST AND CREDIT INFORMATION] (2017) (setting forth a schedule that specifies how the scores of an individual or a corporate entity are added or retracted).

⁴ See *supra* note 2.

⁵ “Shenfen Lian” app Fabu Guizhou Qingzhen Tansuo Da Shuju Shidai de Chengxin Xiangtu Jianshe (身份链 app"发布 贵州清镇探索大数据时代的诚信乡土建设) [*ID Chain App unveiled to take Guizhou Qingzhen's Honest Rural Society Project to the Era of Big Data*], Huanqiu Wang (环球网) [Huanqiu.com] (May 29, 2017), <http://china.huanqiu.com/hot/2017-05/10762808.html>; Qingzhen Shi Chuangjian Guojia Shehui Xinyong Tixi Jianshe Gongzuo Shishi Fangan (清镇市创建国家社会信用体系建设工作实施方案) [*Qingzhen Plan to Implement the National Social Credit System Project*] Xinyong Zhongguo (Guizhou Guiyang) (信用中国(贵州贵阳)) (Dec. 14, 2017), <http://www.gyscx.gov.cn/a/xinyongdongtai/tongzhigonggao/2017/1214/2727.html>.

⁶ See e.g. THE REPUTATION SOCIETY: HOW ONLINE OPINIONS ARE RESHAPING THE OFFLINE WORLD (Hassan Masum and Mark Tovey eds., 2011) (collecting essays on the theories and practices in relation to the application of reputation systems to various market and social governance contexts).

most confident “Yes” response come from nowhere else but a place like Qingzhen where one, till this day, continues to find muddy country paths to be paved into driveways and illiterate rural residents to be taught the use of smartphones. However, Qingzhen in fact is but one boldest example, if not a microform, of a general policy development in China: Across the country, the entrepreneurial and increasingly resourceful Party-state is turning decidedly to reputation as a critical tool for transforming its legal and regulatory institutions.

Most notably, in 2014, China’s highest executive authority, the State Council, issued a top-level policy document (hereinafter the “**2014 Blueprint**”) that offered a lengthy description of a blueprint for building a “social credit system” in China (hereinafter the “**SCSP**,” standing for the “social credit system project”).⁷ The government’s overall objective for the SCSP appears to be tackling many of the country’s intractable regulatory problems in its social and economic realms, ranging from fraudulent behaviors in the marketplace, to difficulties in enforcing court judgments, to corruption in the government, and to professional malpractices and even plagiarism in scholarship.⁸ All these different kinds of vice, as authorities apparently figure, have their common pathology in the rampant “trust breaking” behaviors, which in turn results from the lack of reputation tracking and effective incentives in the forms of sanctions and rewards.⁹ The SCSP appears premised on such thought that the key to

⁷ Guowuyuan Shehui Xinyong Tixi Jianshe Guihua Gangyao (2014-2020) (国务院《社会信用体系建设规划纲要》(2014-2020年)) [STATE COUNCIL BLUEPRINT FOR BUILDING THE SOCIAL CREDIT SYSTEM] (2014).

⁸ *See id.* at PART I.1 (listing a range of governance and regulatory problems to tackle with the SCSP).

⁹ *See id.* (noting the current status of China’s credit system is problematic for a

curtailing these problems and improving social control must lie in the government's leveraging reputation mechanisms in all possible ways.¹⁰

That government authorities seek to use reputation mechanisms in law, regulation, and governance is not a uniquely Chinese phenomenon. In this Article, I use the phrase “*reputation state*” as a shorthand for this development in law and governance that has been underway globally. Compared with the rise of the “reputation society,” on which much ink has been spilled already in the Western legal and policy literature,¹¹ the emergence of the reputation state has thus far received limited scholarly attention. While related phenomenon in scattered cases has been explored,¹² a systematic examination is yet to be performed on how and why the state uses reputation as a strategic governance instrument.

The SCSP offers a unique opportunity for us to study closely the reputation state. As a comprehensive and singularly framed policy project, the SCSP knows no equivalent elsewhere in the world. While originally intended as a set of government effort to jumpstart the modern credit reporting and rating practices in primarily the narrow context of bank lending,¹³ the SCSP, since the late 1990s, has evolved

serious deficiency in both credit records and associated incentives).

¹⁰ *See id.* at PART I.3 (“[T]he primary goal of the SCSP is to ... establish a system that covers all corners of the society... [in order to] saliently improve honesty and sincerity in government, business, social life and judicial systems, to significantly improve market and societal satisfaction [and to] generally improve ... the credit environment of the market and ... the social economic order.”)

¹¹ *See supra* note 6.

¹² Scholarly works have noticed and considered a number of scattered cases that represent or foreshadow such development. *See e.g.* LUCIO PICCI, REPUTATION-BASED GOVERNANCE (2010); Lior Jacob Strahilevitz, “*How's My Driving?*” *For Everyone (and Everything?)*, 81 N.Y.U. L. REV. 1699 (2006); Strahilevitz, *Reputation Nation*, *supra* note 1.

¹³ The Chinese government first came to realize the utility of modern credit and

subsequently into a project with a sweeping scope. As a cursory reading of the 2014 Blueprint and a series of related policy documents (hereinafter the “**SCSP policy documents**”) should suffice to reveal, the Chinese state on the national level aspires to achieve the same as what Qingzhen, as earlier mentioned, has been striving for locally, which in essence is to use reputation mechanisms for everyone and on everything.

But how does the Chinese state actually plan to piece together such an ambitious and seemingly all-encompassing policy project? What are the key drivers underlying the Chinese state’s pull towards a comprehensive reputation state? In theory and in practice, what could be the SCSP’s plausible promises? And where do its challenges and risks actually lie? To effectively address these questions is critical for understanding not only China’s SCSP but also, more generally, the reputation state’s path traversed and trajectories for the future.

To make clear sense of the SCSP is a challenging task, however, in particular given the sheer absence of much useful guidance from the often lengthy and convoluted SCSP policy documents issued by virtually all levels and branches of the Chinese government. Outside of China, observers have increasingly taken note of this development since the release of the 2014 Blueprint. But aside from eye-catching journalistic accounts that

reputation systems when its economic reform took off and reached its banking sector in 1980s. Since late 1980s, the government had begun to work on setting up credit systems both within and outside of the state-controlled banks. In the mid-1990s, to facilitate the rapid growth in corporate lending and financing activities, People’s Bank of China (“PBOC”), the nation’s central bank, started to operate an internal online system of commercial credit information for commercial banks to access and use. *See* Zhongguo Renmin Yinhang Zhongguo Zhengxin Ye Fazhan Baogao (中国人民银行《中国征信业发展报告 (2003-2013)》) [PBOC Report on China’s Credit Reporting Industry 2003-2013] (2013).

portray a data-enabled, big brother style dystopia,¹⁴ in-depth studies written in the English language that carefully document and analyze this development remain limited.¹⁵ For notable examples, Rogier Creemers considered the SCSP from the angle of the Chinese state's partnership with the rising Internet and Communication Technology ("ICT") sector to use newly available technological solutions for government reform.¹⁶ Shazeda Ahmed zeroed in on Sesame Credit, the leading consumer credit scoring system operated by an affiliate of the Chinese Internet giant Alibaba, as the company is often considered as the SCSP's vanguard in the private sector.¹⁷ Mirjam Meissner looked into the SCSP's potential enabling effect on China's

¹⁴ See e.g. *China's Digital Dictatorship*, THE ECONOMIST (Dec. 17, 2016), <https://www.economist.com/news/leaders/21711904-worrying-experiments-new-form-social-control-chinas-digital-dictatorship>; Josh Chin & Gillian Wong, *China's New Tool for Social Control: A Credit Rating for Everything*, WSJ (Nov. 28, 2016), <https://www.wsj.com/articles/chinas-new-tool-for-social-control-a-credit-rating-for-everything-1480351590?mg=prod/accounts-wsj>; Cheang Ming, *FICO with Chinese Characteristics: Nice rewards, But Punishing Penalties*, CNBC (Mar. 16, 2017), <https://www.cnbc.com/2017/03/16/china-social-credit-system-ant-financials-sesame-credit-and-others-give-scores-that-go-beyond-fico.html>; Sara Hsu, *China's New Social Credit System*, THE DIPLOMAT (May 10, 2015), <http://thediplomat.com/2015/05/chinas-new-social-credit-system/>; Mara Hvistendahl, *Inside China's Vast New Experiment in Social Ranking*, WIRED (Dec. 14, 2017), <https://www.wired.com/story/age-of-social-credit/>.

¹⁵ Notable scholarly work includes, e.g. Chen, Yongxi and Anne S. Y. Cheung, *The Transparent Self Under Big Data Profiling: Privacy and Chinese Legislation on the Social Credit System* (June 26, 2017). University of Hong Kong Faculty of Law Research Paper No. 2017/011. Available at SSRN: <https://ssrn.com/abstract=2992537>; Rogier Creemers, *Disrupting the Chinese State: New Actors and New Factors* (May 24, 2016). Presented at the conference Digital Disruption in Asia: Methods and Issues, University of Leiden, 24-25 May 2016. Available at SSRN: <https://ssrn.com/abstract=2978880> or <http://dx.doi.org/10.2139/ssrn.2978880>. For an informative think-tank research, see Mirjam Meissner, *China's Social Credit System: A Big-Data Enabled Approach to Market Regulation with Broad Implications for Doing Business in China*, MERICS (May 24, 2017) <https://www.merics.org/en/microsite/china-monitor/chinas-social-credit-system>.

¹⁶ Creemers, *id.*

¹⁷ Shazeda Ahmed, *Cashless Society, Cached Data Security Considerations for a Chinese Social Credit System*, TheCitizenLab (Jan. 24, 2017), <https://citizenlab.ca/2017/01/cashless-society-cached-data-security-considerations->

economic regulatory capabilities and the resulting impact on domestic and foreign business entities.¹⁸ Yongxi Chen and Anne SY Cheung examined the data privacy issues that could arise from the SCSP and identify the loopholes and gaps in China's relevant privacy regulations.¹⁹ Informative and insightful as these early contributions are, none has captured the behemoth of the SCSP in a sufficiently comprehensive manner. The SCSP, however, is not about the market nor politics alone, its policy approaches involve more than "big data," and its implications for law and governance also go beyond the common concerns of data privacy.

In this Article, I provide the first systematic descriptive and analytical account of the SCSP. As the basic approach to theorization, in this Article I consider the SCSP as a novel case that illustrates a broad trend in the rise of the reputation state. This approach allows me to draw on the general theoretical discussions on the reputation state to identify four key strategies, categorized in this Article as "regulation," "searchlight," "incorporation," and "institutionalization," which government actors may plausibly employ as they seek to use reputation for governmental purposes. While Western experiences already illustrate ways in which these strategies may actually work in practical contexts, China's SCSP takes the reputation state into the uncharted territory as it explores novel possibilities. Upon examining the major policy initiatives included, this Article finds that the SCSP overall represents the effort of China's developmental state to tackle its persistent governance problems with new tools. While it has both

[chinese-social-credit-system/](#).

¹⁸ Meissner, *supra* note 15.

¹⁹ Chen & Cheung, *supra* note 15.

raised high hopes and stoke grave fears, the SCSP, as this Article explains, has been fundamentally shaped and also limited by many of the institutional and market forces that motivate it in the first place. Nonetheless, if future institutional arrangements and technological progress could align to overcome the present implementation challenges, the reputation state effected through the SCSP does have the potential to change law and government as we know them in China and beyond.

The rest of this Article proceeds as follows. Part II explains this Article's conceptualization of reputation and the four basic types of government strategies for using reputation in law and governance, drawing primarily from existing Western legal and policy literature and related practical examples in the United States. Part III then unpacks the SCSP's major policy initiatives and examines how the basic strategies, as identified in Part II, are deployed in these different policy programs. In developing this descriptive account, that Part shows that the SCSP policy initiatives can be conceptually separated into two general groups. Through one group, the Chinese state is laying down some basic technical and institutional infrastructures for the reputation state, whereas through the other group the Chinese state attempts at more radical social engineering endeavors, including the use of reputation mechanisms to strengthen the social control effect of both law and social norms. Along the way, as the major policy initiatives are described, their rationales, issues, and challenges are also reviewed, often against comparable U.S. examples as a reference point.

Part IV then provides a stylized account of the four key institutional and market forces that, as I explain, have motivated and shaped the SCSP. Comprehensively framed

as it is, the SCSP can be considered as an empty vessel into which diverse interests, as held by central policymakers, lower-level government actors, and private business players, have been poured. Part V then offers initial analysis on the SCSP's potential impact and implications on three important aspects that are however less commonly reflected upon. It first argues that the rise of the reputation state, as embodied by the SCSP, in theory foreshadows a plausible future that allows centralized governance to be more effective and thus defies the neoliberal prediction for order to arise in more decentralized manners. It then analyzes the virtues and pitfalls of more stringent enforcement that could become enabled by the SCSP. It finally considers the promises and limits for reputation to function as a tool for higher government authorities to control its subsidiaries. Part VI briefly concludes.

For a note on methodology, this study draws on both a critical review of public materials, including most of the currently available SCSP policy documents issued thus far by China's central, sectoral and local government authorities,²⁰ as well as information acquired through observations and interviews during related field study projects.²¹ As the SCSP's implementation process continues to unfold and evolve,

²⁰ There have so far been hundreds of these documents as issued from all levels and branches of government. Most of these policy documents can be found on Credit China, the Chinese government website dedicated to SCSP-related information. *See* Zhengce Fagui (政策法规) [Website Section on Policy and Legal Documents], Xinyong Zhongguo (信用中国) [CREDIT CHINA], <http://www.creditchina.gov.cn/zhengcefagui/?navPage=2>.

²¹ Aside of general and specific information about the SCSP's policy design and implementation collected through various formal and informal channels, onsite field observation was also conducted primarily throughout the year of 2017 in Guiyang and Qingzhen, Guizhou by myself and two graduate students from Ocean University of China under my supervision.

further information may become available to enable more systematic empirical investigations in future research.

II. REPUTATION AND THE STATE: STRATEGIC USE OF REPUTATION

A. Conceptualizing Reputation

Reputation is a perennial human phenomenon.²² Existing literature, nonetheless, has not achieved any uniformly agreed-upon definition for reputation. For the purpose of this Article, I shall conceptualize reputation by underscoring two types of social processes that are inherent and essential to reputation's social functions, namely the production of reputation-related information and individual and collective decisionmaking activities based on reputation.

As commonly understood, reputation is generated from and entails a set of descriptive and/or evaluative information about an actor, including but not limited to his or her past conduct, which in one way or another tells us about such actor's characteristics and helps us predict future act or performance of the same actor.²³ In

²² Hassan Masum, Mark Tovey, and Yi-Cheng Zhang, *Introduction: Building the Reputation Society*, in *SUPRA* NOTE 6 AT xv; Randy Farmer, *Web Reputation Systems and the Real World*, in *ID.* AT 13. Some argue that even animals can be observed as utilizing rudimentary reputation mechanisms in decision making, such as social learning and eavesdropping. John Whitfield, *The Biology of Reputation*, in *supra* note 6 at 40; Adam Thierer et. al., *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the "Lemons Problem,"* 70 U. MIAMI L. REV. 830, 840-72 (2016).

²³ Chrysanthos Dellarocas, *Designing Reputation Systems for the Social Web*, in *supra* note 6, at 4; Eric Goldman, *Regulating Reputation*, *supra* note 6 at 51-52; David S. Ardia, *Reputation in A Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 264 (2010). Note some definition of reputation may be more expansive and without the predictive element, so that dead people may have reputation too. See NUNO GAROUPA & TOM GINSBURG, *JUDICIAL REPUTATION: A COMPARATIVE THEORY* 4 (2015).

the pre-digital age, reputation-related information was collected and disseminated primarily through mechanisms of offline interpersonal networks, such as word-of-mouth, gossips, shared memories and community norms.²⁴ With the aid of modern technologies, today such information can be generated with data that are collected with highly sophisticated surveillance and behavioral tracking methods and processed through computer algorithms. Sometimes reputation information may take the form of direct feedback,²⁵ such as through grapevine gossips and eBay consumer reviews; other times it is indirectly generated through mediating process that further aggregates and analyzes the relevant data, as illustrated by FICO scores for financial credibility, Slashdot's karma points for content quality,²⁶ or Klout scores for social networks popularity.²⁷

Yet reputation information matters primarily because it is sought after and used by all kinds of rational actors to make decisions.²⁸ Buyers on eBay want to learn from scores given by others to a vendor to decide what they will buy or avoid. Patrons check Yelp! and similar local business review sites to decide whether to dine at a restaurant or shop in a store. Gig workers refer to Turkopticon reviews on job requesters to decide whether a job posted by a requester on Amazon Mechanical Turks is worthwhile to

²⁴ See e.g., Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

²⁵ Jamais Cascio, *The Future of Reputation Networks*, in *supra* note 6 at 185-186.

²⁶ See YOCHAI BENKLER, *WEALTH OF NETWORKS* 76-80 (2006).

²⁷ See *The Klout Score*, <https://klout.com/corp/score>.

²⁸ Dellarocas, *supra* note 23 at 4; Goldman, *supra* note 23 at 51-52.

take.²⁹ These private decisions made upon reputation information are consequential as they affect the welfare on both the decisionmakers themselves and the reputation subjects. In particular, reputation subjects could face consequences that take many forms, such as ostracism or esteem from communities, and increased or reduced economic and social transactional opportunities with potential counterparties.³⁰ The prospect of being subject to reputation-based decisionmaking thus creates behavioral incentives for social actors of a particular group or at large. When Uber adopts the policy to suspend a driver for falling below a certain rating, for example, such policy surely affects those individuals who are actually dropped from the platform, but more importantly, it creates incentives for Uber drivers in general to provide satisfactory services.³¹

Both popular and academic literature on reputation has predominantly focused on the information element of reputation.³² Granted, today's digital reputation systems

²⁹ M. Six Silberman and Lilly Irani, *Operating an Employer Reputation System: Lessons from Turkoicon, 2008-2015*, 37 COMP. LABOR LAW & POL'Y J. 505 (2016).

³⁰ In modern marketplaces where digital reputation systems exist, empirical studies have typically found that the sales performance of merchants in those market can be heavily influenced by online reviews that drive consumer choices. *See e.g.* D.K. Gauri, A. Bhatnagar, R. Rao, *Role of Word of Mouth in Online Store Loyalty: Comparing Online Store Ratings with Other e-store Loyalty Factors*, 51 Comm. of the ACM 89 (2008); E.K. Clemons, G.G. Gao, L.M. Hitt, *When Online Reviews Meet Hyperdifferentiation: A Study of the Craft Beer Industry*, 23 J. MGMT INFO. SYS. 149 (2006); Ye, R. Law, B. Gu, *The Impact of Online User Reviews on Hotel Room Sales*, 28 INT'L J. HOSPITALITY MGMT 180 (2009).

³¹ Rafi Mohammed, *Uber's "Price Gouging" Is the Future of Business*, HARV. BUS. REV. (Dec. 16, 2013), www.hbr.org/2013/12/ubers-price-gouging-is-the-future-of-business?utm_source=feedburner.

³² In particular in the Western literature. In contrast, Chinese scholars in much earlier discussions about social credit systems already underscored that positive and negative behavioral incentives are indispensable components of such systems. *See* Lin Yifu (林毅夫), *Shehui Xinyong Tixi Jianshe yu Jinrong Gaige* (社会信用体系建设与金融改革) [*Social Credit System Construction and Financial Reform*], *Zhongguo Jinrong* (中

differ most profoundly from those of the brick-and-mortar era in the unprecedented quantity and variety of data they now are able to draw on. It is also true that reputation-based decisionmaking and subsequent behavioral incentives often ensue as a natural or inevitable outcome when reputation information becomes generated and circulated.³³ Nonetheless, many reputation systems today are the product of deliberate system design that seeks to establish a specific connection between particular types of reputation information and specific decisionmaking activities. For example, sharing platforms such as Uber and Airbnb both use a provider's review scores as a basis for suspension or termination;³⁴ Alibaba's online shopping platforms, Taobao and Tmall, operate rating systems that specifically link eligibility for platform-sponsored promotion opportunities and transaction restrictions for vendors based on their consumer satisfaction scores.³⁵ A useful conceptualization of reputation today, therefore, should highlight factors and dynamics related to both aspects of reputation-related information and reputation-based decisionmaking.

B. The Conventional Paradigm: Government Regulation of the Reputation Market

Where and why do we expect to see the state playing a role in a society where reputation has become increasingly systemized? In existing legal and policy scholarship,

国金融) [CHINA FINANCE], no.12, 2004.

³³ Such panopticon logic, *see e.g.* Strahilevitz, *How's My Driving*, *supra* note 12 at 1711 (suggesting that being watched *per se* functions as a deterrent to bad behaviors)

³⁴ *See supra* note 31; Weishenme Wo de Fangyuan bei Zanshi Zhongzhi huo Zanting Zhanghao? (为什么我的房源被暂时中止或暂停账号?) [*Why was My Listing Paused or Suspended*], AIRBNB.COM, <https://zh.airbnb.com/help/article/1303/why-was-my-listing-paused-or-suspended>

³⁵ A description of Taobao's reputation systems, *see* Lizhi Liu & Barry Weingast, *Taobao, Federalism, and the Emergence of "Law, Chinese Style,"* 102 MINN. L. REV. _ (forthcoming 2018).

the dominant perspective on the relations between government actors and reputation is often premised on the notion that reputation systems foremost emerge and operate as a spontaneous force in the marketplace and the civil society.³⁶ The baseline position, according to this line of thinking, is that reputation is welfare-enhancing as they facilitate beneficial private ordering in the market economy and the general social life.³⁷ For example, in obviously neo-classical terms, Eric Goldman theorizes that, by reducing information asymmetry in the marketplace, reputation systems may improve the functioning of the Smithian “invisible hand” and therefore enhance economic efficiency.³⁸ Lior Strahilevitz further posits that, through mobilizing crowdsourced information and informal social sanctions, reputation mechanisms not only may induce socially efficient behaviors in less costly and more effective ways than state’s formal legal and regulatory tools,³⁹ but they also could reduce private decisionmakers’ reliance on statistical discrimination that otherwise has problematic distributional consequences.⁴⁰

These optimistic views about the reputation market, as previously mentioned, have

³⁶ See e.g. Thierer et. al., *supra* note 13.

³⁷ Gary E. Bolton et al., *How Effective Are Electronic Reputation Mechanisms? An Experimental Investigation*, 50 MGMT. SCI. 1587, 1592 (2004) (comparing various markets including those with and without feedback mechanisms).

³⁸ Goldman, *supra* note 23 at 53. Adam Smith in fact did take note of the behavioral effect of reputation. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 86 (1853 ed. 1759) (noting that one’s success almost always depends upon the favor and good opinion of their neighbors and equals.)

³⁹ Strahilevitz, *How’s My Driving*, *supra* note 12.

⁴⁰ Strahilevitz, *Reputation Nation*, *supra* note 1 at 1724-26. See also Jules Polonetsky & Christopher Wolf, *Big Data: A Tool for Fighting Discrimination and Empowering Groups*, Future of Privacy Forum (2014), <http://www.futureofprivacy.org/wp-content/uploads/Big-Data-A-Tool-for-Fighting-Discrimination-and-Empowering-Groups-Report1.pdf>.

received notable support from empirical evidence.⁴¹ Their intuitive implication for law and policy, meanwhile, is to allow reputation to flourish in the market, and the government, as an exogenous imposition on the reputation market, should intervene when such market fails and cause harms so that the net welfare gain from the reputation market is maximized.

Legal scholars have so far considered potential failures of the reputation market in at least the following senses. First, privacy scholars persistently warn that private reputation systems could cause information harms on individuals. As they worry, the proliferation of reputation technologies could lead to intrusive collection and offensive disclosure and use of personal information;⁴² scoring systems could have a negative, disparate impact on traditionally disadvantaged groups;⁴³ and the ubiquity of reputation systems could also lead to excessive revelation of personal information.⁴⁴ Where externality problems exist, the state should intervene through tools such as regulatory scrutiny and liability laws, and such intervention is often considered as useful.

Second, the market of reputation may fail because of strategic behaviors. Powerful incentives may exist to induce self-profiting behaviors through system-gaming,

⁴¹ Paul Resnick, Richard Zeckhauser and John Swanson, *The Value of Reputation on eBay: A Controlled Experiment*, 9 EXP. ECON. 79 (2006) (summarizing 15 studies on eBay). *Also see supra* notes 24 & 30.

⁴² *See generally* DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* (2007).

⁴³ Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 14 (2014).

⁴⁴ Scott R. Peppet, *Unraveling Privacy: The Personal Prospectus and the Threat of A Full-Disclosure Future*, 105 Nw. U. L. Rev. 1153 (2011).

manipulation, and fraud.⁴⁵ Fake reviews, astroturfing, and malicious inputs are widely reported to plague many reputation systems.⁴⁶ To these types of strategic behaviors, regulatory intervention is also an intuitive response, although the more optimistic view is that market and technology could also offer solutions absent state intervention.⁴⁷ Not surprisingly, the optimistic view is not shared by all, and the debate is not settled about the extent to which self-correction effectively abates strategic behaviors in the reputation market.⁴⁸

Third, problems relating to anti-competitive behaviors and monopoly may also present in the reputation market, which potentially needs to be addressed by the state's regulatory intervention. For example, with the rise of vertical and general review sites, many merchants tend to insert provisions in their consumer agreements that prohibit consumers from posting online reviews about them, and such private suppression of reputation production may be where the state does need to intervene with legal remedies.⁴⁹ More profoundly, scholars as Frank Pasquale argue that today's digital

⁴⁵ Shun Ye, Guodong (Gordon) Gao and Siva Viswanathan, *Strategic Behavior in Online Reputation Systems: Evidence from Revoking on eBay* 38 MIS Q. 1033 (2014).

⁴⁶ Abbey Stemler, *Feedback Loop Failure: Implications for the Self-Regulation of the Sharing Economy*, 18 MINN. J.L. SCI. & TECH. 673, 688-703 (2017).

⁴⁷ For example, Goldman suggests that competition and private ordering in the reputation market produce secondary reputation systems to regulate other reputation systems, and those primary systems that do not properly address problems such as fake reviews will thus be exposed and avoided by potential users. *See Goldman, supra* note 23.

⁴⁸ For example, Yelp! and other consumer review sites have been accused for manipulating its power to extract advertising business from small business owners. Lori A. Roberts, *Brawling with the Consumer Review Site Bully*, 84 U. CIN. L. REV. 633, 639-648 (2016) ("billion dollar bully"). *See also* Daniel J. Solove, *Speech, Privacy, and Reputation on the Internet*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH AND REPUTATION* (Saul Levmore and Martha C. Nussbaum eds., 2010).

⁴⁹ Goldman, *supra* note 23 at 58.

reputation systems are monopolized by companies who master opaque black box algorithms, and these monopolists are manipulating these black box reputation systems to exploit citizens' personal data for maximizing their own profits.⁵⁰ To address such problems, a range of aggressive regulatory proposals over private algorithms have been made in order to increase transparency and intelligibility.⁵¹

Fourth, given that socially desirable reputation systems sometimes are in the nature of public good, the market alone may not produce the optimal number of them. To the extent the private sector may lack clear interest in taking the necessary initiative to set up reputation systems in an optimal manner, it has also been proposed that the state may usefully intervene to mandate the establishment and use of certain reputation tracking programs.⁵²

In sum, the existing literature largely envisions the state's role as an external regulator who intervenes to address such typical pathologies of market failures as negative externalities, strategic behaviors, anti-competitive maneuvers, and public good, provided they cannot be addressed otherwise through private ordering. Many well-known government interventions in the United States indeed may be considered

⁵⁰ See generally FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015).

⁵¹ *Id.* at 217-18; Frank Pasquale, *Dominant Search Engines: An Essential Cultural & Political Facility*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET* 415-17 (2010).

⁵² For example, Strahilevitz argues that socially beneficial reputation systems, such as "How's My Driving for Everyone" programs, would be unlikely to emerge and become adopted in an optimal manner given the absence of clear private sector interest that would take the necessary initiative. In response, he proposes that the state may usefully intervene there by mandating universal participation of drivers to participate in such reputation tracking programs. Strahilevitz, *How's My Driving*, *supra* note 12 at 1717-19.

with such a neoliberal framework. For example, in addition to a number of sectoral laws and regulations on data privacy and security matters, such legislations in the United States as the Fair Credit Reporting Act (“FCRA”), the Fair and Accurate Credit Transactions Act and the Equal Credit Opportunity Act also have set up regulatory regimes to specifically regulate potential externalities arising from the generation, dissemination, and use of consumer credit history and scores.⁵³ Besides, through legislation, private litigation, and regulatory enforcement actions, U.S. authorities have also sought to tackle problems such as fraudulent reviews⁵⁴ and contractual suppression of reviews.⁵⁵

C. *The Assertive Paradigms: Searchlight, Incorporation, and Institutionalization*

While common and important, the regulation paradigm falls short of capturing the full picture of how government actors today strategically use reputation mechanisms. In particular, as one attempts at understanding China’s SCSP, even casual observers would discern that the Chinese state, operating under a different set of political and institutional assumptions, envisions for this project scenarios of government intervention that goes beyond the neoliberal notion of regulating market failures.

But that does not mean that China’s SCSP must be considered as only an *ad hoc*

⁵³ Fair Credit Reporting Act, 15 U.S.C. § 1681 (2012); Fair and Accurate Credit Transactions Act (FACTA) of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended across sections of 15 U.S.C.) (amending the Fair Credit Reporting Act of 1970); Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2012)

⁵⁴ Stacy Feuer, *Crossing Borders with Online Reviews and Endorsements? There’s a Roadmap for That!*, FTC (Jun. 30, 2016), <https://www.ftc.gov/news-events/blogs/business-blog/2016/06/crossing-borders-online-reviews-endorsements-theres-roadmap>.

⁵⁵ See Consumer Review Fairness Act, 15 U.S.C. §45b. State legislation, *see e.g.* Cal. Civil Code § 1680 (2015).

phenomenon. As here we conceptualize reputation as consisting of reputation information and reputation-based decisionmaking, neither has to come about from exclusively private sector actors. In addition to regulating the reputation market from the outside, any government actor may, at least in theory, draw on its own information and power resources and interject itself strategically into reputation's inner operations. That suggests that at least three more assertive paradigms of government strategies are plausible. Using as illustrations practical examples from the United States, this Section shows that these strategies, conceptually quite interventionist as they may appear, have in fact already been used by government actors in a neoliberal political system.

1. The searchlight strategy

The first type of strategy may be referred to as the "searchlight" strategy.⁵⁶ In using the searchlight strategy, government actors channel public sector data and information in different formats into the reputation market for private actors' use in their decisionmaking activities. Because such public sector information may allow the reputation market to more effectively sort reputation subjects and thus create stronger reputation incentives on the same, the government may expect some of its regulatory goals to be achieved without necessarily invoking the otherwise more costly public intervention through the police and the court.⁵⁷

⁵⁶ LIOR JACOB STRAHILEVITZ, INFORMATION AND EXCLUSION 158 (2011).

⁵⁷ PICCI, *SUPRA* NOTE 12 AT 53-54; Michael Halberstam, *Beyond Transparency: Rethinking Election Reform from an Open Government Perspective*, 38 SEATTLE U. L. REV. 1007, 1026 (2015) (citing Obama Administration's 2009 Open Government Directive that describes the purpose of Open Government as not primarily accountability or anticorruption, but public and private sector participation in government operations and problem solving).

One well-known U.S. example for the government actors' use of the searchlight strategy concerns the effect of Megan's Law and similar regimes for the public disclosure of criminal history are also famous examples. Under many states' Megan's Laws, authorities impose mandatory registration requirements for sex offenders and publicize their personal information on dedicated websites, with which communities, employers, and potential romantic suits could make more informed decisions in managing their safety risks.⁵⁸

The rise of the Open Government Data ("OGD") regimes in recent years suggests that the searchlight strategy may be pursued in the future in a more wholesale format and at an increasingly large scale. In the U.S. context, government authorities under OGD regimes typically set up and offer websites, APIs, and data repository platforms to allow the general public to access a large quantity of government data in both raw and processed forms.⁵⁹ In addition to subsidizing reputation systems in the marketplace with government information resources, the OGD regimes can also serve powerful tools for government transparency and accountability, as the public may use such information to better track and evaluate the performance of government actors.⁶⁰

2. The incorporation strategy

⁵⁸ *Match.com to Begin Checking for Sex Offenders in Wake of Lawsuit*, CNN (Apr. 18, 2011), <http://www.cnn.com/2011/TECH/web/04/18/match.rape.lawsuit/index.html> (Members of online dating sites could also take into consideration criminal background checks on potential suits run by these sites against sources such as the National Sex Offender Registry)

⁵⁹ Micah Altman, Alexandra Wood, David R. O'Brien, Salil Vadhan, Urs Gasser, *Towards A Modern Approach to Privacy-Aware Government Data Releases*, 30 BERKELEY TECH. L.J. 1967, 2059 (2015)

⁶⁰ Lucio Picci, *Reputation-Based Governance and Making States "Legible" to Their Citizens*, in *supra* note 6 at 143.

Government actors may also actively acquire and incorporate reputation information generated in the market to inform public decisionmaking, in particular with respect to the allocation of its abundant resources of carrots and sticks upon different regulatory subjects. Such government strategy is called here for shorthand as “incorporation.”

In the U.S. context, it may be difficult to imagine that government actors use the incorporation strategy in such ways as where authorities check on an individual’s FICO scores or social media popularity ratings in deciding how large a fine to impose on such individual for a violation of, say, parking ordinance. Nonetheless, in law enforcement and the more clandestine anti-terrorism contexts, practices in the similar nature do exist. In particular, after 9/11, taking advantage of the U.S. regulatory asymmetry with respect to public and private surveillance, national security authorities have leveraged a range of informal collaborative arrangements with private data controllers and data brokers, through which they procure private-sector data in both raw and processed forms and aggregate the same in “fusion centers” established across regions.⁶¹ In the civilian context, a more mundane example on point is the SEC rules that require financial firms to use credit ratings issued by “nationally recognized statistical rating organization” to fulfill a range of regulatory requirements.⁶² A conceptually more novel example, meanwhile, is the Peer-to-Patent project, which creates an online forum for outside

⁶¹ Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CAL. L. REV. 901, 908-19 (2008)

⁶² Adoption of Amendments to Rule 15c3-1 and Adoption of Alternative Net Capital Requirement for Certain Brokers and Dealers, Exchange Act Release 34-11497 of June 26, 1975, <https://www.sec.gov/ocr/ocr-learn-nrsros.html>.

volunteers to discuss pending patent applications and suggest instances of relevant prior art, which suggestions are taken into consideration by patent examiners at the USPTO in making decisions on the application.⁶³

Besides, there are also occasions where U.S. government actors seek outside feedback and reviews from citizens in the process of overseeing and disciplining public officials. A common type of programs in this nature concern law enforcement officers. New York City, for example, has developed a system of Civilian Complaint Review Boards that receive citizen reports of police abuse and investigate and take actions upon the same.⁶⁴ Some proposes, in like spirit, that information on police behaviors gathered and compiled by grassroots “copwatching” organizations should be used by police supervisors and administrators.⁶⁵ Others have also proposed for formal 360-degree feedback programs through which litigants and counsels review the performance of prosecutors⁶⁶ and judges.⁶⁷

⁶³ See PICCI, *SUPRA* NOTE 12 AT 9-10. Another novel proposal is for city health inspectors to use Yelp restaurant reviews about food-born illness to significantly economize hygiene inspection efforts. See Edward L. Glaeser, et al., *Big Data and Big Cities: The Promises and Limitations of Improved Measures of Urban Life*, Harvard Business School NOM Unit Working Paper 16-065, 2015, <https://dash.harvard.edu/bitstream/handle/1/24009688/16-065.pdf?sequence=1>, pp.30-32.

⁶⁴ *About CCRB*, NYC Civilian Complaint Review Board, <https://www1.nyc.gov/site/ccrb/about/about.page>.

⁶⁵ Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 391, 420 (2016).

⁶⁶ See generally Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1014 (2009) (Prosing to use performance evaluations by fellow prosecutors, defense counsel, defendants, judges, jurors, and victims as a foundation for an incentive-pay system for prosecutors).

⁶⁷ See generally David K. Kessler, *The More You Know: How 360-Degree Feedback Could Help Federal District Judges*, 62 RUTGERS L. REV. 687 (2010). Currently informal comments on federal district judges are solicited from attorneys in the Almanac of the Federal Judiciary. See *id.* 694.

3. The institutionalization strategy

In pursuing either the searchlight or the incorporation strategy, the state essentially transforms reputation into a public-private joint venture. Yet one logical next step the state could simply take is to set up public reputation systems by mobilizing both of its own information resources and decisionmaking power. More specifically, government actors may set up reputation profiles and/or generate reputation scores on individual and corporate citizens, which are used then by the same and other government actors in making decisions on these subjects in future administrative and regulatory encounters with the same. Because in so doing the state effectively introduces the operational logic of reputation systems into the formal institutional process of law and regulation, in this Article I call such strategy “institutionalization.”

In the U.S. context, the prototypical institutionalization scenario again may impress one as hypothetical: A government agency produces reputation scores on individual citizens based primarily on processing data stored in the public sector data systems, and such scores are then used by the same and other agencies for decisions about such matters as distributing social security benefits, issuing business licenses, granting parole and probation, and even making arrests. While U.S. government actors may not have used the institutionalization strategy in ways as far-reaching as described, there are quite a number of scenarios where authorities have adopted reputation tracking, interagency data sharing and/or data mining practices that as combined are intended to produce similar effects. For example, in both civilian and military government procurement contexts, some agencies track and score vendors on their past performance

for the use in future bidding and contracting processes.⁶⁸

The surge of big data technologies has further expanded data analytics efforts within the government systems. Tax, health, security, and education authorities have frequently sought to mine digitized personal data held in networked public databases.

⁶⁹ Actual or conceptual blacklists have been found to result from these data mining efforts, which the authorities use to make decisions about whether to subject relevant individuals to working, voting, or fly restrictions, immigration detention and deportations, and counter-terrorism surveillance.⁷⁰ Moreover, in connection with the recent development in “smart cities,” U.S. local governments have also increasingly deployed predictive algorithms in performing many types of public functions, including but not limited to decisions on the pretrial release of a defendant, child custody, and police patrol allocations.⁷¹ While government use of predictive algorithms is not identical to its use of institutionalized reputation, in many contexts these two are closely related. As typically expected, the institutionalization of reputation, enabled by the powerful tools of interagency data sharing, data mining, and predictive algorithms, allows the government to allocate its resources, including its sanctions and rewards, in

⁶⁸ PICCI, *SUPRA* NOTE 12, CH.8.

⁶⁹ Tal Z. Zarsky, *Transparent Predictions*, 2013 U. ILL. L. REV. 1503, 1511 (2013) (noting that the IRS uses predictive modeling to find individuals who are most likely to file false returns by analyzing the vast datasets at its disposal, which include information regarding previous instances of tax fraud, and other personal and financial data); Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy Decisionmaking in Administrative Agencies*, 75 U. CHI. L. REV. 75, 75-76 (2008).

⁷⁰ Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1742-44 (2015).

⁷¹ Robert Brauneis & Ellen P. Goodman, *Algorithmic Transparency for the Smart City*, 20 YALE J. L. & TECH. 103, 114-15 (2018). *See also* VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2018).

more targeted, individualized, and efficient ways, and that accordingly lays down one important stepping stone towards the personalization of law, regulation, and the delivery of government services in general.⁷²

D. Summary

This Article’s conceptualization of reputation as consisting of reputation information and reputation-based decisionmaking sheds light on the basic paradigms of how the state may use reputation as an instrument for law and governance purposes. Most commonly understood, the state can regulate the reputation market from the outside to promote the benefits from reputation’s private ordering effect and at the same time minimize its downsides. But more assertively, government actors could interject its own information resources, decisionmaking powers, or both as it seeks to use reputation. The below matrix presents the ideal types that capture these basic government strategies.

	Private information sector	Public information sector
Private actors’ decisionmaking	regulation	Searchlight
Public authorities’ decisionmaking	incorporation	institutionalization

Table 3.1: Four paradigms of government strategies to use reputation

Existing legal and public policy scholarship on reputation has thus far focused on

⁷² Personalization through data technologies has been an aspired goal by the U.S. government. See GAO, *Data Mining: Federal Efforts Cover a Wide Range of Uses*, GAO-04-548, 2-3 (May 2004), <http://www.gao.gov/new.items/d04548.pdf>.

institutional practices that involve the use of primarily regulation and searchlight strategies. But as this Part so far has demonstrated, even in the United States government actors have made various attempts at taking advantages of the more assertive incorporation and institutionalization strategies.

Note that in the real world, each of a wide array of policy initiatives and programs does not have to fall squarely and exclusively into one but not any other quadrant in the above matrix. Instead, a reputation-inspired government program could well combine the use of more than one basic strategy. For example, when government actors aggregate and process information to generate reputation scores, they could both release such scores to inform market actors and use them to guide their own decisionmaking, thus mixing both searchlight and institutionalization strategies. Or, specific regulatory arrangements may have public and private decisionmakers exchange information they each hold for the other's use as reputation signals, and thus combining both searchlight and incorporation strategies. Further, since public sector information and private sector information become now increasingly pooled together when being used in the government decisionmaking process, many programs have essentially combined the use of incorporation and institutionalization strategies.

The possibility of combining multiple strategies suggests that government actors in real-world contexts may engage reputation in even more novel and likely controversial approaches than typically conceived. Western government actors, such as those of the United States, have not exhausted all the plausible approaches. As we turn to the SCSP in the next Part.III, using the U.S. practices as a comparative reference

point helps shed a clearer light on areas where genuinely novel explorations are undertaken in the Chinese context.

III. THE SCSP UNPACKED

What does China exactly envision for the SCSP, and how does it plan to achieve its objectives? For those who would start with the project's caption for a clue, the English term of "social credit" is far from perfect a translation for the Chinese phrase "*shehui xinyong*." While the word "credit" in English does not connote as broadly, its Chinese counterpart associates with a host of lofty moral virtues such as trustworthiness, promise-keeping, norm abiding, integrity and general courtesy. Meanwhile, the modifier "social" underscores, as a matter of Chinese language, that "credit" here concerns not only financial and commercial transactions but all other contexts of societal interactions as well.

Such a broad and vague moral framing appears, however, the only visible overarching theme that unifies the various cohorts of policy initiatives included in the SCSP. According to the SCSP policy documents, the project in its current version packages, under the caption of "government honesty," almost every type of policy initiatives plausibly pertinent to improving law and governance, including such textbook rule-of-law proposals as the expanded use of public hearing and consultation procedures and strengthening legislative oversight of executive branch.⁷³ It then proposes to control, as issues of "business honesty," a wide array of questionable or

⁷³ 2014 BLUEPRINT, PART II.1.

illegal market behaviors, ranging from selling unsafe or counterfeit consumer products to antitrust violations.⁷⁴ Reform initiatives for improving the overall public image and credibility of the judicial system, typically understood as part of the judicial reform, is now also included in the SCSP as its “judicial credibility” component.⁷⁵ Whatever else that looks difficult to be grouped into the foregoing categories, such as regulating medical professionals with ethical rules, restraining academics from plagiarism, and encouraging social organizations to file public interest suits on mass consumer or environmental torts, among others, are lumped together under the caption of “societal honesty.”⁷⁶ Plus, somewhat characteristically Chinese, the SCSP also calls for dedicating resources to education and propaganda programs to promote a general culture of trust and honesty.⁷⁷ Without more, an impression is inevitable that the SCSP is a hodgepodge of public administration and legal reform initiatives.

Most published research on the SCSP have thus far attempted only at describing some parts of this massive scheme.⁷⁸ In this Part III, I show how the SCSP can be effectively understood as the Chinese government’s multifaceted effort at utilizing the effects, resources, and mechanisms of reputation to improve the functions of its law and

⁷⁴ 2014 BLUEPRINT, PART II.2.

⁷⁵ 2014 BLUEPRINT, PART II.4. The reference to “judicial branch” concerns not only courts but also procuratorate and police in the Chinese context.

⁷⁶ 2014 BLUEPRINT, PART II.3

⁷⁷ 2014 BLUEPRINT, PART III. Much earlier in time, *see* Quanguo Zhenggui Ban Zhongxuan Bu Zhongyang Wenming Ban Deng Guanyu Kaizhan Shehui Chengxin Xuanchuan Jiaoyu de Gongzuo Yijian (全国整规办、中宣部、中央文明办等关于开展社会诚信宣传教育的工作意见) [WORKING GUIDANCE ON PROMOTION AND PROPAGANDA FOR SOCIAL HONESTY AND CREDIT ISSUED BY THE OFFICE FOR DISCIPLINING AND NORMALIZING MARKET ORDER LEADING GROUP, THE CCP CENTRAL PROPAGANDA DEPARTMENT AND THE CENTRAL CIVILIZATION MATTER OFFICE] (2003).

⁷⁸ *See* text accompanying *supra* notes 14 to 19.

governance apparatus. The rest of this Part organizes a descriptive and analytical account of the SCSP by separating its major policy initiatives into two general groups. The first group consists of efforts undertaken by the Chinese government in laying down the necessary market, institutional and technological infrastructure for its emerging reputation state. The second group consists of more novel, and in some sense radical, social engineering initiatives that are intended to transform China's market and government systems.

A. *Building Infrastructures for the Reputation State*

As the government acknowledges, China's reputation society at the current stage is still relatively underdeveloped. To support the state's overall agenda of using reputation as an instrumental force of governance, the SCSP includes initiatives that can be viewed as trying to establish and upgrade China's relevant market, technical and institutional infrastructures.

1. Making the reputation market

The SCSP, as mentioned, dates its origin back to a much more narrowly conceived government project that, since the late 1980s, has sought to create modern credit reporting and rating practices for China's banking and finance sector.⁷⁹ As corporate and consumer demand for credit and financing continued to grow outside of the tightly controlled banking industry, which over time led to the rise of an enormous "shadow banking" sector,⁸⁰ the importance of having a more developed market of corporate and

⁷⁹ *Supra* note 13.

⁸⁰ Wei Shen, *Shadow Banking System in China – Origin, Uniqueness and Governmental Responses*, 1 J. INT'L BANK. L. & REG. 20 (2013).

consumer credit agencies outside of the bank system has become increasingly salient to the authorities.⁸¹

The momentum for a dramatic expansion in market-based, non-bank credit agencies started in the late 2000's thanks primarily to the boom in China's big data and Internet-based finance.⁸² Drawing on the massive consumer transactional data accumulated through their business operations, e-commerce firms started to conduct credit reporting and ratings on their users, which allow them to optimize operations, regulate platform activities, facilitate credit-based transactions, and eventually expand into core financial services.⁸³ Since 2013, accompanying the flourishing online consumer lending platforms, hundreds of big data credit and risk control firms have emerged to offer credit analytics for consumer lending transactions, which are used by not only Internet lending firms but also traditional banks.⁸⁴

Against such a background, the Chinese authorities have eventually, as part of the SCSP initiatives, moved forward with formally setting up a regulated market for non-

⁸¹ 2014 Blueprint, Part VI.3; Yanghang jiu Jiakuai Xiaowei Qiye he Nongcun Xinyong Tixi Jianshe da Jizhe Wen (央行就加快小微企业和农村信用体系建设答记者问) [*PBOC Addresses Press on Accelerating the Construction of Small and Micro-Enterprise and Rural Credit System*], Tengxun (腾讯网) [TENCENT] (Mar. 27), <http://finance.qq.com/a/20140327/017480.htm>.

⁸² Douglas W. Arner et. al., *The Evolution of Fintech: A New Post-Crisis Paradigm?*, 47 GEO. J. INT'L L. 1271, 1298 (2016) (Since 2009, over 2000 P2P lending platforms have emerged.)

⁸³ Alibaba started to provide third party certification services in the B2B context as early as 2002 when it was still of a very small size. Its credit database in 2011 claimed a million paid subscribers. Liu Xinhai (刘新海), Zhengxin yu Da Shuju (征信与大数据) [CREDIT INFORMATION SERVICE AND BIG DATA](2016) at 307-8. The company first tested water with internet finance in 2010 by launching a small-size loan platform.

⁸⁴ Zhang Yuzhe et al (张宇哲等), Zhengsu Shuju Chanye Lian (整肃数据产业链) [*Policing the Big Data Industry*], Caixin Zhoukan(财新周刊) [CAIXIN WEEKLY] (Aug. 4, 2017), <http://topics.caixin.com/zssjcy/>.

bank credit agencies. In 2013, the State Council enacted the long overdue⁸⁵ Regulation on the Industry of Credit Information, which laid down a formal regulatory regime on the licensing, incorporation and operation of credit agencies,⁸⁶ with a more concrete set of Management Rules on Credit Agencies issued by the People’s Bank of China, China’s central bank (hereinafter “PBOC”), to follow shortly after.⁸⁷ Since 2015, the government has also rolled out new systems of uniform identification numbers that are meant to be used for credit profiles of both individual citizens and business and social organizations.⁸⁸

With a formal regulatory framework in place, the PBOC took the first step in 2015 towards affording legitimacy to players in the previously gray market for consumer credit⁸⁹ by greenlighting eight firms to “prepare for operating” consumer credit

⁸⁵ Three drafts of the regulation was released for public comments in 2002, 2009 and 2011, respectively.

⁸⁶ Zhengxin Ye Guanli Tiaoli (征信业管理条例) [REGULATION FOR THE ADMINISTRATION OF THE CREDIT REPORTING INDUSTRY] (2013).

⁸⁷ Zhengxin Jigou Guanli Banfa (征信机构管理办法) [MANAGEMENT RULES ON CREDIT AGENCIES](2013).

⁸⁸ For individuals, their national ID numbers have since become transformed into a singular identifier that will be required and used in many more transactional contexts. For business and non-profit entities, the different identifiers they were previously assigned by each of the multiple regulatory authorities they deal with have become replaced by a new uniform social credit number to be used across all regulatory and transactional contexts. *See* Faren he Qita Zuzhi Tongyi Xinyong Daima Zhidu Jianshe Zongti Fangan (法人和其他组织统一社会信用代码制度建设总体方案) [GENERAL PLAN FOR CONSTRUCTION THE SYSTEM OF UNIFORM SOCIAL CREDIT IDENTIFIERS FOR LEGAL PERSONS AND OTHER ORGANIZATIONS] (2015); Guowuyuan Bangong Ting Guanyu Jiaqiang Geren Chengxin Tixi Jianshe de Zhidao Yijian (国务院办公厅关于加强个人诚信体系建设的指导意见) [STATE COUNCIL OFFICE GUIDING OPINION ON STRENGTHENING INDIVIDUAL HONEST AND CREDIT SYSTEM] (2016).

⁸⁹ Beforehand, there was one Shanghai firm sponsored by the PBOC was set up in 1999 and started to run a first pilot program in consumer credit reporting in 2000. Yao Jia (姚佳), Geren Jinrong Zhengxin de Falv Guizhi (个人金融征信的法律规制) [LEGAL REGULATION OF INDIVIDUAL FINANCIAL REGULATION] (2011) at 28.

systems on a pilot basis.⁹⁰ The eight firms notably include affiliates of such dominant Internet giants as Alibaba and Tencent.⁹¹ The PBOC initially planned to issue formal licenses after a six-month period. Once formal licenses are issued, the market landscape can surely be expected to reshuffle dramatically, with a regulated market open only to licensed players whereas other players currently operating under legal uncertainties formally outlawed.⁹² Such prospect of a structural change in the market has spurred intense speculative interest.⁹³ Firms operating the pilot programs have also been active in taking advantage of their regulatory privileges in growing their business. The Alibaba-affiliated Sesame Credit,⁹⁴ the most high-profile firm selected into the pilot

⁹⁰ Zhongguo Renmin Yinhang Guanyu Zuohao Geren Zhengxin Yewu Zhunbei Gongzuo de Tongzhi (中国人民银行关于做好个人征信业务准备工作的通知) [*Bank of China Releases Notice on Preparation of Individual Credit Collection*] (2015).

⁹¹ One other firm, Qianhai Credit, is associated with the established full-service finance conglomerate Ping An Group; other five are relatively more independent in forms but nevertheless are also considered to have certain affiliations with financial firms.

⁹² Wan Cunzhi: Wei Shenme Bajia Jigou Liangnian Duo Hai Mei Nadao Geren Zhengxin Paizhao (万存知：为什么八家机构两年多还没拿到个人征信牌照?) [*Wan Cunzhi on Why the Eight Agencies Have Not Been Licensed As Being More Than Two Years in the Pilot Program*], Peking University Institute of Digital Finance (May 31, 2017), <http://idf.pku.edu.cn/index/point/2017/0531/29490.html>. (PBOC official noting that there are more than 500,000 firms in China that have registered with the Business Administration Authorities “credit” as one of their intended operating area, of which one third are interested in consumer credit reporting and others in corporate credit reporting).

⁹³ See e.g. Xinyong Zhongguo Shangxian Yunxing Gainian Gu Dazhang (“信用中国”上线运行 概念股大涨) [*Credit China Site Went Online Sparking Rise of Conceptually Related Stocks*], Fenghuang Caijing (凤凰财经) [IFENG FINANCE], http://finance.ifeng.com/a/20150602/13748776_0.shtml (reporting that the PBOC moves signaling opening up the consumer credit reporting market sparked a wave of stock price rise for companies that are perceived as potential contenders in such market).

⁹⁴ Sesame Credit is a private credit scoring system developed by Ant Financial Services Group, a company that is generally understood as an affiliate with the Chinese e-commerce conglomerate Alibaba Group given a rather complex history of Alipay’s spinoff from Alibaba Group and a profit sharing arrangement resulting

program, has aggressively marketed itself by expanding its credit scores to novel applications, including at one point the determination of who may skip the security check line at Beijing's international airport.⁹⁵

In an unexpected turn, however, no license ended up being issued to any of the eight individual firms operating the pilot programs. In April 2017 a senior PBOC official hinted that none of the eight pilot programs were meeting the PBOC's expectations with respect to fairness in rating, institutional independence, and data privacy and security.⁹⁶ While these are surely genuine and important regulatory concerns, it may have appeared odd to close observers of the pilot program that the regulatory authorities did not identify the related issues as troubling at a much earlier stage. For example, the issue of independence and conflict of interests, which the PBOC openly raised against major players such as Sesame and Tencent in 2017,⁹⁷ surely had

therefrom. Nonetheless, as a matter of formal legal structure, the Alibaba Group discloses that it has neither equity interest in or control over Ant Finance. *See e.g.* Annual Report for the Fiscal Year ended March 31, 2017, Form 20-F of Alibaba Group Holding Limited, p.ii, <https://www.sec.gov/Archives/edgar/data/1577552/000104746917004019/a2231121z20-f.htm>.

⁹⁵ Hvistendahl, *supra* note 14. The collaboration between Sesame and the airport, which took place in 2015, was subsequently halted by an order from the PBOC. *See* Zhima Xinyong ZHEME Gaodiao Dan Haiyou Jige Yiwen Nanyi Huida (芝麻信用这么高调, 但还有几个疑问难以回答) [Sesame Credit Went High-Profile But Facing Tough Questions], Huxiu (虎嗅) [HUXIU] (Jun. 6, 2017), <https://www.huxiu.com/article/198462.html?rec=similar>.

⁹⁶ *See supra* note 92 (PBOC official Wan Cunzhi commenting that it was surprising to the regulators that the eight firms fell far short of meeting the expectations in the areas of the privacy, security, and operational independence).

⁹⁷ Some suggests that PBOC may not have really meant that none of the eight is independent enough, but was simply reluctant to publicly name names (in particular those of Sesame, Tencent, and Qianhai). *See* Guo Yuhang (郭宇航), Bajia Zhengxin Jigou Bingfei Quan Dou Bu Hege Ying Chengshu Yijia Shidian Yijia (八家征信机构并非全都不合格, 应成熟一家试点一家) [*All Eight Firms Are Not Meeting Regulatory Requirements, and the Pilot Program Should Have Been Rolled Out on a*

existed back when these firms first received the green light in 2015. Yet even till the present day, the PBOC has not given any guidance about its criteria for determining a credit agency's operational independence. In fact, fundamental uncertainties as such in the regulatory environment have over the years expectedly induced private firms, eyeing on a piece of the consumer credit market, to compete aggressively over forging government relations rather than developing product and service offerings, which in turn has become a source of the regulatory conundrum in this area.

By all means, through their experience with the pilot scheme, the authorities apparently came to perceive an even higher stake in the development of the nascent financial credit information market than they did.⁹⁸ Moreover, the slowing down in the progress towards licensing consumer credit agencies was also understood to reflect a general, high-level shift of the Chinese government's policy stance in 2016 and 2017 towards more cautiously managing the increasingly exposed financial and social risks from the operations of Internet-based peer-to-peer credit firms.⁹⁹ Eventually, around the end of 2017 and early 2018, it became clear that the Chinese government had determined to run the credit reporting and rating market in a model that allows it much greater and more direct control than merely a licensing scheme will do: The first formal license to conduct consumer credit business, as ultimately issued by the PBOC in

Case-by-Case Basis], Shanghai Finance Institute (May 8, 2017), <http://www.sfi.org.cn/plus/view.php?aid=1055>.

⁹⁸ *See supra* note 92 (PBOC official Wan Cunzhi remarking that many of the issues with the pilot programs were “unexpected”).

⁹⁹ *See id.* (PBOC official Wan Cunzhi commenting that the PBOC did not expect that a general crackdown against Internet-based finance business was launched soon after the pilot consumer credit programs had been greenlighted to go).

February 2018, was to a joint venture named “Baihang Credit Scoring,” which was newly formed with the government-backed National Internet Finance Association of China as the largest shareholder, holding 36% interest in equity, and the eight pilot firms each as a shareholder of 8%.¹⁰⁰ Although further operational detail is yet to become available, this government-controlled credit reporting agency, as the dominant and sole legitimate player in the field, is expected to source its data from Internet-based lending firms, small and micro-lending firms and consumer financing firms, all of which had previously been beyond the coverage of the traditional state-controlled bank credit system.¹⁰¹ Substantial uncertainty remains, as of this writing, about whether the private firms will continue to operate their separate systems in one form or another,¹⁰² or become more or less reduced to a role of data sources for Baihang’s uniform credit scoring system.¹⁰³

¹⁰⁰ Shouzhang Geren Zhengxin Paizhao Zhengshi Xiafa Baihang Zhengxin Huo Pai (首张个人征信牌照正式下发 百行征信获牌) [First Consumer Credit License Formally Issued to Baihang Credit Reporting], http://www.xinhuanet.com/money/2018-02/24/c_129815794.htm.

¹⁰¹ Sun Shuang (孙爽), Shouzhang Geren Zhengxin Paizhao Hualuo Baihang Zhengxin Zhe Jida Wenti Daijie (首张个人征信牌照花落百行征信, 这几大问题待解) [*First Consumer Credit Reporting License Issued to Baihang Credit Scoring with Some Major Questions To Be Answered*], Yiling Caijing (Feb. 22, 2018), <http://mp.weixin.qq.com/s/HGtZy7B5IXUFx9uAOR0xTw>.

¹⁰² In February 2018, Tencent rolled out its own pilot consumer credit scoring system that can be accessed by individual users through a smartphone app, but quickly pulled it offline under allegedly pressure from the regulators, suggesting that the regulators may no longer allow these firms to operate systems separate from that of Baihang. That said, Sesame Credit has continued to operate its scoring system as of this writing. Lucy Hornby, Sherry Fei Ju & Louise Lucas, *China Cracks Down on Tech Credit Scoring*, FINANCIAL TIMES (Feb. 4, 2018), <https://www.ft.com/content/f23e0cb2-07ec-11e8-9650-9c0ad2d7c5b5>.

¹⁰³ Sun Shuang (孙爽), Shouzhang Geren Zhengxin Paizhao Hualuo Baihang Zhengxin Zhe Jida Wenti Daijie (首张个人征信牌照花落百行征信, 这几大问题待解) [*First Consumer Credit Reporting License Issued to Baihang Credit Scoring with Some Major Questions To Be Answered*], Yiling Caijing (Feb. 22, 2018),

2. Specific and general information infrastructure

The SCSP policy documents note more than once that the underdevelopment of China's reputation market is attributable to a serious shortage in credit-related information.¹⁰⁴ This perceived shortage stems from dynamics on both sides of demand and supply. On one hand, facing intensified competition, banks and other financial institutions are now looking to expanding their reach into borrowers who until recently have little to none credit history, including rural residents, young urban residents, and small and micro-business firms.¹⁰⁵ On the other hand, many believe that government bodies have not made adequate efforts in making accessible public sector data they collect and accumulate, let alone in easy-to-use formats, for potential use by private reputation systems.¹⁰⁶

Through the SCSP, the Chinese government aims to channel public sector

<http://mp.weixin.qq.com/s/HGtZy7B5IXUFx9uAOR0xTw> (Noting that it is unclear if the establishment of Baihang would mean that in the future Sesame Credit, as a 8% shareholder, will then offer all its consumer credit data to be used by Baihang).

¹⁰⁴ 2014 BLUEPRINT, Part I.2 (noting that a credit system that covers the entire system has not been formed and credit record for societal members is in severe shortage in China).

¹⁰⁵ Shen, *supra* note 80.

¹⁰⁶ See e.g. Zheng Lei & Gao Feng (郑磊 高丰), *Zhongguo Zhengfu Shuju Pingtai Yanjiu: Kuangjia Xianzhuang yu Jianyi* (中国政府数据平台研究: 框架、现状与建议) [*Government Data Platforms in China: Platforms, Current Status, and Reform Proposals*], *Dianzi Zhengwu* (电子政务) [E-GOVERNMENT], no.7, 2015 at 11-12 (Evaluating the efficacy of China's OGD platforms against Tim Berners-Lee's five star metrics and finding the overall quality and practical value of data on these platforms low); Zheng Lei & Xiong Jiuyang (郑磊 熊久阳), *Zhongguo Difang Zhengfu Kaifang Shuju Yanjiu: Jishu yu Falv Texing* (中国地方政府开放数据研究: 技术与法律特性) [*Study on Open Local Government Data in China: Technical and Legal Characteristics*], *Gonggong Xingzheng Pinglun* (公共行政评论) [PUBLIC ADMINISTRATION REVIEW], no.1, 2017 at 57 (finding inefficiencies in local government OGD platforms).

information into the market so that such information can be either directly used or further processed as reputation information for private actors' decision-making activities. Such information and data, often called "public credit information" in China's legal and official documents, are typically defined to include broadly any information and data collected or generated by public agencies that can be used in evaluating how well a subject observes its legal and contractual obligations.¹⁰⁷ The SCSP has specifically directed public investments in upgrading government information infrastructure that is necessary for generating, processing and disseminating the public credit information.

Most notably, both national and local government bodies have invested in setting up dedicated national and sectoral "credit information" databases, data platforms and portals¹⁰⁸ that aggregate and process the public credit information from previously isolated systems maintained by different sectoral and regional authorities. Such

¹⁰⁷ See e.g. Shanghai Shi Shehui Xinyong Tiaoli (上海市社会信用条例) [SHANGHAI MUNICIPAL REGULATION ON SOCIAL CREDIT] (hereinafter "**SHANGHAI REGULATION**"), Section 2 (defining social credit as the status of an information subject in terms of complying with its legal and contractual obligations) and Section 8 (defining "public credit information" as credit information collected by public agencies during the process of performing public functions). Local legislations typically distinguish public credit information and private credit information, the latter of which corresponds to the private sector information as discussed in this Article. However, note that these terms in the local legislation are not always precisely defined, as they are in the Shanghai Regulation, but sometimes may be used like term of art. In Wuxi's legislation, for example, while public credit information initially is defined as information generated from the course of government activities, a subsequent section then expands the term to information that government bodies may seek to obtain from private sources. See Wuxi Shi Gonggong Xinyong Xinxin Tiaoli (无锡市公共信用信息条例) [WUXI MUNICIPAL REGULATION ON PUBLIC CREDIT INFORMATION], Section 3 (narrowly defining public credit information) and Section 16 (expanding definition of public credit information to those from private sources).

¹⁰⁸ 2014 BLUEPRINT, PART IV.

infrastructure certainly supports the government's use of searchlight strategy. But its more important use, as intended in the SCSP, is to enable data sharing among government actors for internal coordination in institutionalization programs, such as in the various types of JSR schemes as described later in Part III.B.5.¹⁰⁹

Beyond the dedicated infrastructure investment relating to the specifically defined public credit information, the SCSP indeed also calls for an overall upgrade of China's general open government data practices.¹¹⁰ Starting from 2012, more than a dozen localities, including developed cities such as Shanghai, Beijing, Foshan, and Wuhan, have set up OGD portals, and the plan for a nationwide OGD platform has also been placed on the central government's policy agenda since 2015.¹¹¹ Compared with the regular government information sites, these OGD portals typically offer data in greater quantity and more easily usable format. The relatively sophisticated among them, constructed with cloud computing technologies, also offer tools and interfaces for analytics akin to those of OGD portals in the United States.¹¹²

At this point, however, it remains uncertain about whether sufficiently sophisticated, user-friendly OGD infrastructure will become widely established to benefit China's reputation market on a large scale. With the sophisticated program in

¹⁰⁹ 2014 BLUEPRINT, PART IV (noting that establishing a comprehensive credit information and data system is the precondition for functional reputation-based incentive and sanction mechanisms).

¹¹⁰ 2014 BLUEPRINT PART VI.C (describing government open information project as part of the SCSCP initiative).

¹¹¹ Zheng & Gao, *supra* note 106 at 8.

¹¹² See e.g. Shanghai Shi Zhengfu Shuju Fuwu Wang (上海市政府数据服务网) [*Shanghai Municipal Government Data Service Site*], www.datashanghai.gov.cn.

Shanghai as a notable exception,¹¹³ close observers point out that the existing programs are still limited in their scopes and features. In particular, data covered in these programs often cannot be used in most efficient manners as they have not been processed into machine-readable formats, are not updated timely and frequently, or are subject to restrictive terms on secondary use.¹¹⁴

3. Framework of data regulation

Establishing an effective regulatory framework over the imminent and potential issues resulting from the private and public sector reputation systems is a major agenda the Chinese state sets for the SCSP. Although a legislation of highest authority in the FCRA-style applicable to either credit reporting or other types of reputation systems does not exist in China, the aforementioned Regulation on the Industry of Credit Information in 2013, a nationwide administrative regulation, has set up basic data protection norms applicable to credit agencies servicing the financial and banking market. Relatedly, China has in recent years also made notable progress in general data protection legislation, including a Criminal Law Amendment that imposes severe punitive sanctions against illegal transactions in personal data, and a new Cybersecurity Law that is China's first national legislation to specifically provide for the basic legal

¹¹³ Under the Shanghai program a greater quantity and variety of government data has been constantly made public in machine readable formats, and the government has also proactively promoted their use by outside developers through venues such as government sponsored open data applications contest. *See e.g.* Zheng Lei & Lv Wenzeng (郑磊 吕文增), *Gonggong Shuju Kaifang de Chanchu yu Xiaoguo Yanjiu: Yi Shanghai Kaifang Shuju Chuangxin Yingyong Dasai wei Li* (公共数据开放的产出与效果研究——以上海开放数据创新应用大赛为例) [*A Study on the Productive Results of Government Open Data: The Case of Shanghai's Open Data Application Contest*], *Dianzi Zhengwu* (电子政务) [E-GOVERNMENT], no.9, 2017.

¹¹⁴ *Supra* note 106.

principles on data privacy and security.¹¹⁵

Moreover, a number of provincial and lower level authorities, including Hubei, Shanghai, Hangzhou, have moved ahead to formally legislate regulatory regimes for their local SCSP programs that include privacy and security norms and standards on data collection, processing, storage and use as well as mechanisms for remedying reputation harms resulting from inaccurate and misused information.¹¹⁶ These local laws set up for both public and private data controllers' behaviors some backbone norms that have long been absent in China. For example, in Shanghai's local social credit legislation enacted in 2017, one can easily see such progressive data privacy norms as, among others, a "right to be forgotten" for reputation subjects from government social credit data system,¹¹⁷ a right to credit restoration,¹¹⁸ and a reasonableness requirement on administrative agencies' query over citizens' social credit information.¹¹⁹

These institutional developments, as some correctively critiqued, are not adequate

¹¹⁵ 29 INTELL. PROP. & TECH. L.J. 20, 21, 29 (2017) (summarizing the key provisions of China's Cybersecurity Law).

¹¹⁶ *See e.g.* SHANGHAI REGULATION, Sec. 34-38; Hubei Sheng Shehui Xinyong Xinxi Guanli Tiaoli (湖北省社会信用信息管理条例) [HUBEI SOCIAL CREDIT INFORMATION ADMINISTRATIVE RULES], Sec. 32-38; Hangzhou Shi Gonggong Xinyong Xinxi Guanli Banfa (杭州市公共信用信息管理办法) [HANGZHOU PUBLIC CREDIT INFORMATION ADMINISTRATIVE RULES], Sec. 16, 24-30.

¹¹⁷ SHANGHAI REGULATION, Sec. 35 (credit information on government data platform will remain available for inquiry for five years). Note the national regulation over credit reporting agencies have similar rules, but that regulation does not govern government behaviors whereas the local regulations do. *See* REGULATION ON THE INDUSTRY OF CREDIT INFORMATION, Sec. 16.

¹¹⁸ *See id.* at Sec. 38. *Also see* Guowuyuan Bangongting Guanyu Jiaqiang Geren Chengxin Tixi Jianshe de Zhidao Yijian (国务院办公厅关于加强个人诚信体系建设的指导意见) [STATE COUNCIL OFFICE GUIDANCE ON STEPPING UP THE WORK ON CONSTRUCTING THE INDIVIDUAL TRUST AND CREDIT SYSTEM] (2016) (requiring specifically that credit restoration mechanisms must be established as part of the SCSP).

¹¹⁹ SHANGHAI REGULATION, Sec. 17 & 20.

to tackle the regulatory challenges China faces as the SCSP becomes implemented.¹²⁰ More generally speaking, data risks arising from government use of reputation can be inherently difficult to regulate. In the U.S. context, as American governments also pursue large-scale OGD regimes in recent years, scholars have warned that such programs could incur more systemic privacy risks than what the current FIPs, Privacy Act and specific federal and state statutory data privacy regimes can effectively manage.¹²¹ And although law and social attitudes in the United States both limit the ability of the government to surveil private citizens, many important carve-outs and legal gaps enable massive and controversial dataveillance by authorities.¹²²

Compared with the United States, China's background legal protections on government data practices are even weaker,¹²³ and existing restrictions on government actors' collection and use of citizens' data have long been absent or loosely enforced.

¹²⁰ Chen & Cheung examined the current status of China's national and local legislation on data privacy and security issues in relation to the SCSP, and concluded that the lately enacted regulatory requirements, compared against best practices, are still inadequate for controlling risks in government and private sector data practices involved in the SCSP programs. *See* Chen & Cheung, *supra* note 15.

¹²¹ As Altman et al. surveyed, for example, the release of public records under OGD programs, such as those currently adopted in Boston and Seattle, could cause sensitive data to be linked with particular individuals even if they are purportedly de-identified. Prevalent data protection practices such as withholding, redacting, and coarsening information before release may not afford adequate protection of such sensitive information, and more sophisticated technical mechanisms thus seem necessary for controlling the incremental data protection risks brought by OGD regimes. *See* Altman et al., *supra* note 59 at 2070.

¹²² These may include, but not limited to, the third party doctrine, the law enforcement carve-outs in many data protection statutes, and the regulatory asymmetry with respect to public and private surveillance that enable arrangements such as the fusion centers where information from different public agencies become aggregated for further processing. Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 487 & n.2 (2013); Michaels, *supra* note 61 at 908-19 (2008).

¹²³ *See* Chen & Cheung, *supra* note 15.

As news reports have repeatedly revealed in recent years, many government data platforms and systems are also highly vulnerable to hacker attacks and security breaches.¹²⁴

Moreover, thanks to the long absence of effective regulation, the rapid growth of China's Internet industry had in the past led to the accumulation of systemic data risks. Problematic data practices of private sector players have long been commonplace in China, and rogue big data firms aside, even highly sophisticated companies such as Alibaba have been exposed to have fallen at times for rudimentary data breaches and lapses.¹²⁵ Nearly uncontrolled data collection and rampant illegal data trades over the years have resulted in an outsized black market, in which a massive and still growing pool of personal data are constantly acquired, aggregated, sold and exploited in questionable or plainly illegal ways.¹²⁶ One concern now looming large is that data from such illegal sources could be increasingly whitewashed as they are used by otherwise legitimate firms in developing and operating the SCSP-inspired reputation

¹²⁴ See e.g. Shebao Xinxi Menhu Dakai Zhengfu Wangzhan Anquan Kanyou (社保信息门户大开：政府网站安全堪忧) [*Social Security Information Portal Exposed to Severe Security Risks*], Wangyi Keji (网易科技) [NETEASE TECH] (May 4, 2015), <http://tech.163.com/15/0504/09/AOOTLV4Q000915BF.html> (reporting that the data systems of many local social security agencies have been found as being exposed to hacking risks); Chuyu Fengkou de Zhengwu Yun Ruhe Yingdui Shuju Luoben Anquan Zhiyi (处于风口的政务云，如何应对数据“裸奔”安全质疑) [*How Government Cloud System May Respond to Security Risks*], CSDN (Nov. 29, 2017), <https://www.csdn.net/article/a/2017-11-29/15936119> (reporting that inspections revealed that many cloud systems used by government entities are exposed to significant data security risks).

¹²⁵ Shazeda Ahmed & Adrian Fong, *Cashless Society, Cached Data: Are Mobile Payment Systems Protecting Chinese Citizens' Data?*, THE CITIZEN LAB (Jan. 20, 2017), <https://citizenlab.ca/2017/01/cashless-society-cached-data-mobile-payment-systems-protecting-chinese-citizens-data/>.

¹²⁶ See *supra* note 84.

systems, including credit reporting and rating systems. As publicized information reveals, for example, many banks that purchase credit profiles from the big data firms are often aware of but acquiesced to the questionable legality of the data used by these firms.¹²⁷

The regulatory infrastructure China has built so far in connection with the SCSP, therefore, remains clearly far from adequate for dealing with the challenges it raises. That being said, some perspective is also needed here. Unlike in the Western context, where a perceived equilibrium between privacy and public power is worried for being under threat as the government becomes equipped with digital reputation, many of China's data privacy and security perils relating to government information practices predate and exist independent of the SCSP. For example, China's government authorities have maintained for decades dossiers and profiles on urban citizens, which consist of a variety of descriptive and evaluative personal information. Despite the expected flaws with respect to data accuracy, timeliness, and relevance, such dossiers have been used in all kinds of public administrative contexts.¹²⁸ Before the SCSP pushes governments to establish an increasing number of centralized databases and platforms, leading sources of data acquired and transacted in the previously described black market have already included rampant illegal data sales by government agencies and officials and security breaches in government databases.¹²⁹ In addition, notorious incidents of government actors' inappropriate disclosures and use of personal

¹²⁷ *Id.*

¹²⁸ See HONG YUNG LEE, FROM REVOLUTIONARY CADRES TO PARTY TECHNOCRATS IN SOCIALIST CHINA, CH.13 (1990).

¹²⁹ See *supra* note 84.

information have also much more to do with their general lack of sensitivity to data issues than any technological or institutional arrangements specific to the SCSP initiatives.

Considered against such background, the SCSP brings with it not only a plausible increase in risks but also notable opportunities for China's regulatory regimes to advance from the status quo. Besides the newly proscribed laws and regulations, along with the SCSP's implementation, cultural norms and societal attitudes in China could further evolve towards favoring more robust privacy regulations.¹³⁰ Regulatory signals for favoring higher data privacy and security standards are also observably triggering reactions from market players towards improving their data practices.¹³¹ While these developments, even combined, are still far from warranting the establishment of an effective data regulation regime, they nevertheless suggest that the SCSP may play a positive role by creating a salient focal point in China for instigating debates and channeling the previously lacking political capital, institutional efforts, and market resources to data regulations.¹³²

¹³⁰ As explicitly acknowledged by a PBOC official, for example, the unexpectedly strong public reaction on data protection issues were one of the reasons that the PBOC chose to delay the formal licensing for consumer credit agencies. *See supra* note 92 (remarking that the society at large expressed unexpectedly high concerns over data protection issues in connection with the eight companies running pilot consumer credit programs).

¹³¹ After the enactment of the Cybersecurity Law authorities have conducted an unprecedented round of inspections on the data privacy terms used by Internet companies, which reportedly have triggered a wave of amendments. Weixin Taobao Deng Yinsi Tiaokuan Jieshou Kaohe (微信淘宝等隐私条款接受“考核”) [Privacy policies of WeChat and Taobao Are Placed Under Official Inspections], Xinhua (新华) [XINHUANET] (Aug. 24, 2017), http://news.xinhuanet.com/fortune/2017-08/24/c_1121537281.htm.

¹³² Consider, for example, the severe backlash the search giant Baidu's CEO Robin Li

B. *Social Engineering with Reputation*

While its infrastructure building efforts are still underway and facing challenges, the SCSP has already set in motion a series of eye-catching social engineering initiatives. With the U.S. experiences in mind as a comparative point, overall these SCSP policy initiatives reflect the Chinese state's more radical conceptions about a reputation state, raising issues that are yet to be fully considered in existing legal and public policy literature.

1. Reputation for everything

Digital reputation systems beyond finance have flourished in China's Internet over the past decade. Aside from those embedded in e-commerce platforms, there are also countless reputation systems established to operate in connection with social networking sites and consumer review platforms.¹³³ The Chinese state through the SCSP has unabashedly expressed its support for establishing reputation systems in virtually all sectors of economic transactions and social interactions.¹³⁴ The SCSP policy documents specifically instruct, for example, all industry organizations and

has drawn to himself lately for publicly commenting that Chinese public may be less sensitive about privacy issues and more willing to trade their data for convenience and service. See Yangshi Nudui Li Yanhong: Shei Shuo Zhongguo Ren Yuanyi Yong Yinsi Huan Bianli (央视怒怼李彦宏：谁说“中国人愿意用隐私换便利”?) [*CCTV blasts Robin Li: Who Says Chinese People Are Willing To Trade Privacy For Convenience?*], <http://www.ali213.net/news/html/2018-3/353329.html>.

¹³³ Hu Ling (胡凌), Zaixian Shengyu Xitong Yanjin yu Wenti (在线声誉系统：演进与问题) [*Online Reputation System Evolution and Problems*], in Lianjie zhi Hou Gonggong Kongjian Chongjian yu Quanli Zai Fenpei (连接之后：公共空间重建与权力再分配) [*ONCE CONNECTED: RECONSTRUCTING THE PUBLIC SPHERE AND REDISTRIBUTING POWER*] (HUYONG & WANG JUNXIU (胡泳、王俊秀) EDS., 2016) .

¹³⁴ Meissner, *supra* note 15 at 5 (noting that the SCSP covers agriculture, automobile, construction, e-commerce and sharing economy, energy, food and drugs, health, insurance, logistics, media, sports, steel, tourism, transportation)

professional service associations to establish credit profiles and rating systems on member firms and individuals as they exercise their industry self-regulatory function.¹³⁵ These proposals show that the Chinese state finds it attractive to insert reputation systems to supplement laws and regulations wherever the latter do not seem efficacious enough in addressing regulatory problems.

Apparently emboldened by the government's supportive stance, big data-based credit systems in China have since their start been very eager in extending their applications to scenarios beyond finance. Sesame Credit, for example, has embraced an extended concept of "social credit" very early on, expanding the use of its credit scores to scenarios ranging from travel privileges to online dating.¹³⁶ Qianhai Credit, another firm in the PBOC's pilot program, incorporate into its consumer credit model one's record with malicious use of bike sharing services, which was lauded by the Shanghai government as an exemplary social credit initiative that addresses a newly emerged municipal governance problem.¹³⁷

Overall, however, there has been little detail about how exactly the state plans to specifically nudge, support or even compel reputation systems to actually get set up and run their course in as many aspects of people's social and economic life as feasible. Moreover, it begs question to what extent the government's role is necessary and

¹³⁵ 2014 BLUEPRINT, PART II.2&3.

¹³⁶ Celia Hatton, China 'Social Credit': Beijing Sets Up Huge System, BBC News (Oct. 26, 2015) <http://www.bbc.com/news/world-asia-china-34592186>.

¹³⁷ Lanyong Danche Zhengxin jiang Liu Wu Huode Jinrong Fuwu deng Jiang Shouxian (滥用单车者征信将留污 获得金融服务等将受限) [*Abusing Rideshare Services Will Leave One Negative Credit Record and Subject Him to Restrictions in Procuring Financial Services*], Dongfang Zaobao (东方早报) [EASTERN DAILY] (Nov. 17, 2016), http://wap.eastday.com/node2/node3/n5/u1ai702476_t72.html.

desirable in promoting reputation in the marketplaces. On one hand, private incentives for setting up and operating useful reputation systems seem abundant since functional reputation systems in the marketplaces, as general experiences show, often came into being without seemingly a need for any specific boost from the government.¹³⁸ On the other hand, legislators and regulators either may not have the right knowledge or interest in figuring out the specific demand for reputation in different market sectors or could adopt inefficient supportive policies and directives as a result of rent-seeking.

By far, and quite characteristically, the support provided by the Chinese government to the development of non-finance reputation systems in the market has primarily come from its propaganda machine. The SCSP embellishes the importance of propaganda and social meaning creation, and it calls for government bodies to carry out promotional programs to create the salience of “honesty and trustworthiness” as a universal norm.¹³⁹ Propaganda alone, however aggressive, surely does not warrant a change in social value or attitudes. In the case of the SCSP, what government propaganda seems to have achieved is to create a focal point that market players are now visibly utilizing in promoting their own products to consumers. Sesame Credit, for example, has in recent years deliberately invested in a public image that its credit information products serve the SCSP’s public interest goals of restoring societal trust and creditworthiness.¹⁴⁰ Conceivably, through cultivating such image, Sesame seeks

¹³⁸ Dellarocas, *supra* note 23 at 4.

¹³⁹ 2014 BLUEPRINT, Part III.

¹⁴⁰ Zhengfu Gongzuo Baogao Zai Ti Xinyong Jianshe Zhima Xinyong Shichang Qianxing (政府工作报告再提“信用建设”芝麻信用市场前行) [*State Council’s Annual Work Report Mentions Again SCSP Again and Sesame Credit Pulls Forward in the Related Market*], NETEASE NEWS (网易新闻) (Mar. 10, 2016),

not only to improve its perceived legitimacy among consumers but also to create inroad for further business opportunities with government bodies. And given the general shift recently of regulatory preference away from privately operated financial credit reporting services, it seems also strategically necessary for Sesame to keep positioning its reputation system as applicable to SCSP scenarios that are broader than mere finance.

2. Searchlight with blacklists and scores

While the SCSP is yet to stimulate major advancement towards general open government data practices, it has directed government actors to produce specific types of reputation information. Such government-generated reputation, in the spirit of the searchlight strategy, is often both generally publicized and specifically disseminated to financial institutions, credit agencies, and other intended users.¹⁴¹

The most basic and common formats of government generated reputation information are blacklists for subjects of negative reputation, “red lists” for subjects of good reputation,¹⁴² and sometimes lists of other colors to stand for intermediary evaluations.¹⁴³ Pioneering in using such searchlight strategy is the Supreme People’s

<http://news.163.com/16/0310/14/BHQ8JBRP00014AED.html>.

¹⁴¹ See SHANGHAI REGULATION, Sec. 29; Zhonggong Zhongyang Bangong Ting Guowuyuan BangongTing Guanyu Jiakuai Shixin Bei Zhixing Ren Xinyong Jiandu Jingshi he Chengjie Jizhi Jianshe de Yijian (中共中央办公厅、国务院办公厅关于加快推进失信被执行人信用监督、警示和惩戒机制建设的意见) [CCP CENTRAL COMMITTEE OFFICE AND STATE COUNCIL OFFICE OPINION ON ACCELERATING THE USE OF CREDIT SUPERVISION, WARNING, AND SANCTIONS ON TRUST-BREAKING ENFORCEMENT SUBJECTS] (2016) (Directing the establishment of information sharing mechanisms among government agencies, credit agencies, scoring and ranking agencies, financial institutions and social entities).

¹⁴² The color “red,” in Chinese language, typically connotes positive feelings or evaluations, which could differ from its connotation the U.S. context.

¹⁴³ Such as “grey” and “white” lists, which may connote mildly negative and neutral evaluations, respectively.

Court that early on has sought to set up a nationwide blacklist program for “trust-breaking enforcement subjects,” referring to individuals and firms that out of bad faith fail to observe effective court decisions. The blacklisted defaulters, having their information publicized through such program, are reported to have faced reputation-based sanctions widely from banks, business partners, and consumer credit agencies.¹⁴⁴ In many localities, they also suffer general public shaming by having their names displayed on large LED screens in train stations or on outer walls of public buildings. Some local courts have even partnered with telecom carriers to unilaterally change the blacklisters’ cell phone ringtone into a public service announcement, so that whenever such individuals receive a call the phone will ring to announce, to anyone nearby, that the owner of the phone is blacklisted for defaulting on court judgments in bad faith.¹⁴⁵

Inspired by the courts’ blacklisting program, administrative authorities have also in recent years begun to compile and publicize blacklists on matters ranging from “irregular” corporate operating status, serious violations of tax laws, material breach of government procurement contracts and rules, and to general records of administrative

¹⁴⁴ Guanyu dui Shixin Bei Zhixing Ren Shishi Lianhe Chengjie de Hezuo Beiwanglu (关于对失信被执行人实施联合惩戒的合作备忘录) [MEMORANDUM ON IMPLEMENTING JOINT SANCTIONS ON TRUST-BREAKING ENFORCEMENT SUBJECTS] (2016). Sesame Credit discloses at a conference that as of July 2017, it has triggered sanctions by their users on 740,000 judgment defaulters blacklisted by the SPC, and made 50,000 of them perform their obligations. Xinyong Chengshi Tansuo Anli (信用城市探索案例) [*Explorative Case for Building Cities of Trust and Credit*] (hereinafter “**Sesame Credit PR material**”), Ant Financial & Sesame Credit, (Jul. 2017) (on file with the author).

¹⁴⁵ Fayuan gei Laolai Shouji Dingzhi Cailing Shei Dou Neng Tingdao Ta Shixin (法院给老赖手机“定制”彩铃 谁打都能听到他失信) [*Court Makes Customized Cellphone Ringtone for Defaulters So That Everyone Hears That He Broke Trust*], Tengxun Keji (腾讯科技) [TENCENT TECH] (Jun. 14, 2017), <http://tech.qq.com/a/20170614/046644.htm>.

sanctions.¹⁴⁶ Building on the aggregation of information from these offense-based blacklists and other government records, some local authorities have sought to generate subject-based credit reports for private sector users. For example, Wuxi City has since 2011 used public sector information aggregated by a central system to issue “baseline credit evaluation reports” on local business firms. Such reports, while most often consulted by government bodies, are also provided to many commercial lenders.¹⁴⁷

Are the SCSP’s searchlight programs effectively informing private decisionmakers in China’s reputation market? In using the searchlight strategy, the SCSP apparently has placed much greater an emphasis on having government actors generate and publicize specific reputation information as opposed to pursuing a substantial expansion of its general Open Government Data system. Yet as others argue in a related context, compared with government actors, private sector decisionmakers may be in a better position in figuring out how best to put raw data to work for reputation purposes.¹⁴⁸ Conceivably, government ratings and scores are often not produced by those who have the right incentives to learn about the market’s demand for information, and as a result not only the data processing effort may be wasteful but, worse yet, such government reputation could potentially cause distortions of market signals. In an influential empirical study, for example, Daniel Ho demonstrates that government sanitation grades issued to restaurants, as mandated for disclosure to the public, suffer serious

¹⁴⁶ See *infra* Part III.B.5.

¹⁴⁷ Wuxi Danwei Xinyong Jizhun Pingjia Xitong(无锡市单位信用基准评价系统) [*Wuxi Municipal System for Evaluating Baseline Credit Level of Entities*] (distributed at a conference in July 2017, on file with the author).

¹⁴⁸ David Robinson et. al., *Government Data and the Invisible Hand*, 11 YALE J. L. & TECH. 160, 165-66 (2009).

flaws, and likely produce little useful information but shift regulatory resources from other valuable areas.¹⁴⁹

In China's case, the authorities apparently expect that their approach to using the searchlight strategy will ensure themselves a high-level control over the creation and use of reputation signals in the marketplace. But such information may not necessarily be of practical value from the private actors' point of view. Blacklists such as that on judgment defaulters indeed could be of genuine interest to private sector players. But other lists, which proliferate nowadays, could be deemed as mostly noises. For example, compared with a red list of "honest and trustworthy" individuals and firms that government actors desire to praise and promote,¹⁵⁰ the market likely would find it much more useful to have direct access to the transactional and behavioral records underlying such evaluation.

In such vein, the SCSP's searchlight programs are likely subsidizing the reputation market in a suboptimal manner. That said, as will be discussed soon, the now flourishing government blacklists and red lists are being generated often for government actors' own use as well, and therefore making such information available to the public at large does not incur a hefty marginal cost. Besides, government authorities have so far not

¹⁴⁹ Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574 (2012)

¹⁵⁰ See Guowuyuan Guanyu Jianli Wanshan Shouxin Lianhe Jili he Shixin Lianhe Chengjie Zhidu Jiakuai Shehui Chengxin Jianshe de Zhidao Yijian (国务院关于建立完善守信联合激励和失信联合惩戒制度加快推进社会诚信建设的指导意见) [STATE COUNCIL'S GUIDING OPINION ON ACCOMPLISHING JOINT REWARD MECHANISM FOR HONEST BEHAVIORS AND JOINT SANCTIONING MECHANISM ON TRUST-BREAKING BEHAVIORS AND ACCELERATING THE SCSP] (2016) (hereinafter "**2016 GUIDING OPINION**") (requiring that through the SCSP government agencies promote honest market players by publicizing their good record).

heavy-handedly compelled the use by private actors of such government-generated reputation, but have largely left the options primarily to the private actors. That should reduce the risk of government reputation causing a significant distortion of market signals.

One other issue often raised is whether the naming and shaming in such format as the blacklists constitute duplicative and excessive punishments.¹⁵¹ Similar to the U.S. Supreme Court's approach in explaining why Megan's laws are not unconstitutional for being *ex post facto* law,¹⁵² Chinese legal scholars commonly argue that, as a matter of legal nomenclature, "publication" is distinguishable from "punishment."¹⁵³ But such formalist maneuver hardly resolves the underlying substantive fairness conundrum. On one hand, certain punitive effect of the publication of records of past offense seems inevitable, and in fact should even be reasonably expectable for anyone who ever contemplates breaking the law.¹⁵⁴ On the other hand, publicizing government blacklists surely creates a risk of the information being taken out of their original contexts and abused.

The fairness question here thus commands contextual considerations. Many

¹⁵¹ Luo Peixin (罗培新), *Shanzhi Xu Yong Liang Fa Shehui Xinyong Lifa Lun Lue* (善治须用良法: 社会信用立法论略) [*Good Governance Requires Good Law: General View on Social Credit Legislation*], *Faxue* (法学) [LEGAL SCIENCE], no.12, 2016 at 111.

¹⁵² *Smith v. Doe*, 538 U.S. 84 (2003) (insisting that merely disseminating information is not punitive, even shaming requires more).

¹⁵³ *See supra* note 151 at 111.

¹⁵⁴ *See e.g.* John Bronsteen et. al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1049 (2009) ("[w]hereas being in prison may be less uniformly harmful than expected because some of its features lend themselves to adaptation, having been in prison for any length of time may be more harmful than expected because some highly negative features of post-prison life resist adaptation").

probably have good reason to protest, for example, when China's State Tourism Bureau in 2015 issued a rule that purported to publicize a blacklist of tourists engaging in "uncivilized conduct," such as littering and graffiti at sites of attractions.¹⁵⁵ But arguments favoring disclosure may carry greater weight in at least some other situations. For example, given that China's problem with court decisions being underenforced has been notoriously intractable, even some overt public shaming may not be a bad idea if that is indeed what it takes to enhance the stature of the judiciary.

3. Incorporating reputation scores from the market

It is surely nothing revolutionary that China requires its government bodies to solicit and consider information from outside sources. While the SCSP reiterates the importance for government actors to utilize conventional tools of information collection, such as whistleblower incentives,¹⁵⁶ it further emphasizes that government actors also need to consult reputation information, in such formats as blacklists, red lists, and credit scores, that is created by community organizations, financial institutions, credit bureaus, rating agencies, industrial organizations and chambers of commerce.¹⁵⁷

One most representative example for the latter approach of incorporation can be found in the city of Hangzhou, where in January 2017 the municipal business regulatory authorities announced an agreement with Sesame Credit through which the authorities plan to utilize Sesame's credit information on "small and micro-enterprises" (SMEs) in

¹⁵⁵ Guanyu Youke Bu Wenming Xingwei Jilu Guanli Zanxing Banfa (关于游客不文明行为记录管理暂行办法) [PROVISIONAL RULES ON MANAGEMENT OF RECORDS OF UNCIVILIZED TOURIST BEHAVIORS] (2015).

¹⁵⁶ 2014 BLUEPRINT, Part II.2;

¹⁵⁷ 2016 GUIDING OPINION, *SUPRA* NOTE 150 AT Part IV.19.

the regional market in order to improve its allocation of regulatory resources.¹⁵⁸ Under that scheme, when a firm is labeled as “high risk” by Sesame, regulatory authorities will accordingly intensify its scrutiny over such firm, including subjecting it to more frequent compliance inspections.¹⁵⁹ Although identical arrangement for a government agency’s direct use of private reputation scores has thus far not been reported elsewhere, in localities beyond Hangzhou governments have also collaborated with Sesame to accept personal credentials verified by Sesame for the purposes of processing certain public administrative matters, such as distributing pension payments.¹⁶⁰

In more blanket fashion, Shanghai and Hubei have encouraged or required public agencies to “query credit information and use credit product” when making decisions relating to regulatory approval, inspection, sanctions, government procurement, bidding, project funding, land transfer, residential management, civil servant hiring and promotion, recognition with awards and other administrative matters.¹⁶¹ “Credit information” referenced there includes, in addition to government-generated reputation, market reputation information as well. Most recently, it is also reported that some local

¹⁵⁸ Hangzhou Shi Shichang Jianguan Ju Lianshou Zhima Xinyong Gongzhu Xiaowei Qiye Chengxin Ti (杭州市市场监管局联手芝麻信用共筑小微企业诚信体) [Hangzhou Municipal Regulatory Bureau Joined Force with Sesame Credit to Build Small and Micro Enterprise Social Credit System], Zhejiang Administration for Industry & Commerce Official Website (浙江省工商行政管理局网站), http://www.zjaic.gov.cn/art/2017/1/13/art_1240583_5066931.html.

¹⁵⁹ *Id.*

¹⁶⁰ See Sesame Credit PR Material, *supra* note 144.

¹⁶¹ See SHANGHAI REGULATION, Sec. 23 (providing that the municipal government encourages its branches and agencies to query or purchase commercial credit information and services); HUBEI RULES, Sec. 24 (providing that government bodies and agencies may query credit information, including those from sources outside of the government, and use the same as basis for decisionmaking activities in public administration).

government would require more specifically for its agencies to use third-party credit report in conducting its day-to-day regulation.¹⁶²

Although intuition could suggest otherwise, it is actually quite intricate an undertaking for government actors to incorporate private reputation information into its own decisionmaking process. In pursuing the incorporation strategy, government actors could face increased risk associated with the uncertain quality and reliability of such information and data, which potentially harms, instead of improves, government decisions.¹⁶³ Currently, some national and local regulations in China have set out basic procedural mechanisms for addressing issues relating to data errors. In Shanghai and Hubei, local legislations require market sources of reputation information to give broad warranty on such information's legality and integrity,¹⁶⁴ and they also provide for procedural and institutional arrangements to address complaints and disputes over data integrity issues.¹⁶⁵

¹⁶² Henan Yongcheng Tuijin Di San Fang Xinyong Baogao (河南永城：推进使用第三方信用报告) [Henan Yongcheng Pushes Forward Using Third Party Credit Report in Governmental Affairs], Xinyong Zhongguo (信用中国) [CREDIT CHINA] (Sept. 26, 2017), <http://www.creditchina.gov.cn/newsdetail/31276>.

¹⁶³ See e.g. Tal Z. Zarsky, *Governmental Data Mining and Its Alternatives*, 116 PENN ST. L. REV. 285, 298 (2011) (the data mining process is that it is ridden with errors. These errors can be of various forms and come at various stages of the process: they can result from errors in the initial data, errors in the aggregation process, errors in the statistical modeling and computer programming, errors in the implementation of the system or errors in the system's ability to correctly define the risks and match them to the strategies on the ground.)

¹⁶⁴ See SHANGHAI REGULATION, Sec. 13; HUBEI RULES, Sec. 14 & 15.

¹⁶⁵ SHANGHAI REGULATION, Sec. 36. In the year of 2016, Shanghai reports that its system successfully processed around 300 incidents of data complaints, which however most likely relate to data sourced within government systems. 2016 Nian Shanghai Shi Gonggong Xinyong Xinxu Fuwu Pingtai Yunxing Qingkuang Baogao (2016年上海市公共信用信息服务平台运行情况报告) [2016 Shanghai Report on Operations of Shanghai Public Credit Information Service Platform] (2016) (hereinafter *Shanghai Report*), Shanghai Chengxin [上海诚信网] (SHANGHAI

While localities have already set up centralized information aggregation and sharing mechanisms and encouraged market players to proffer reputation-related data and information to the government, it is unclear at the moment how much information currently aggregated on the government social credit information platforms is actually sourced from outside of the government.¹⁶⁶ Since government's incorporation works also as a subsidy to the relevant private reputation system, firms should have strong incentives to lobby for the use of their credit and reputation products in public sector contexts. Sesame Credit, for example, has been more than eager to advertise that their credit scores are being considered by certain public authorities¹⁶⁷ in order to make their systems look more attractive to users. But other than its collaborative arrangements with the Hangzhou municipal government, which has a uniquely close relationship with the Alibaba conglomerate,¹⁶⁸ even a firm so aggressive as Sesame has not reportedly secured many notable deals elsewhere in the similar nature.¹⁶⁹ That suggests that

CREDIT) (Apr. 30, 2017) at 10,

<http://www.shcredit.gov.cn/cxw/yxbg/20171122/609.html>.

¹⁶⁶ While city government such as Shanghai releases informative reports on the status of data aggregation and use on its platform, such report concerns only data sourced from government agencies, not outside of the government. *See e.g. Shanghai Report, supra* note 165.

¹⁶⁷ Including, at one point, some foreign embassies in China that allegedly considered applicants' Sesame score when reviewing their visa applications. Subsequently it has been reported, however, that Sesame's credit scores, even actually considered by some of the embassies, may not have been factored in heavily with the visa decisions nor made it easier for those who had high scores. *See e.g. ArashiH, Post on Zhihu.com* (Jun. 9, 2017),

<https://www.zhihu.com/question/31632462/answer/180236095>.

¹⁶⁸ Sesame Credit is deeply involved in Hangzhou, and has been touting its role in building a "city of trust" in Hangzhou, where the government backs the use of its credit scores in many public services scenarios, such as paying for the use of public transportations and other government facilities. *See Sesame Credit Promotion materials, supra* note 144.

¹⁶⁹ The Beijing Airport security checking arrangement, as previously noted, was subsequently called off. *See supra* note 95. More recently, in September 2017, Sesame

government actors, in general, have not found it actually useful to consult private reputation, in particular those in the processed formats, for their own decision-making purposes.

4. Government reinforcement of reputation and norms

Yet one notable exception to government actors' limited interest in incorporating reputation from outside sources is certain eye-catching local SCSP programs. While these programs involve the use of incorporation strategy, they can be better understood as the government's attempt at reinforcing, with government power of imposing sanctions and distributing benefits, reputation mechanisms that are already embedded in local norm communities.

For example, through one part of the earlier described "Honest Qingzhen" program, often known as "Honest Farmer," the Qingzhen government in Guizhou Province has since 2010 aimed to incentivize rural residents' compliance with "the good moral value of promise-keeping."¹⁷⁰ Local authorities have sought to condition government

entered into a strategic partnership agreement with Chongqing, under which Sesame will play a role to help Chongqing and its subsidiary localities establish social credit data platforms. But there has been no specific indication that Sesame's credit score will be used by the Chongqing government bodies in governmental affairs. Chongqing Jiakuai Xinyong Tixi Jianshe yu Hualong Xinyong Zhima Xinyong Qianshu Zhanlue Hezuo Xieyi (重庆加快信用体系建设 与华龙信用、芝麻信用签署战略合作协议) [*Chongqing Accelerate Social Credit System Construction and Entered into Strategic Partnership Agreement with Hualong and Sesame Credit*], HUALONG [华龙网] (CQNEWS.NET) (Sept. 21, 2017), http://cq.cqnews.net/html/2017-09/21/content_42957685.htm.

¹⁷⁰ As Qingzhen's government officials described, economic development failed to take off in the back country of Qingzhen because local farmers lack the moral fiber for trust and often fail to observe good local norms such as promise keeping. Wang Fuyu (王富玉), Chengxin Yinlai Jin Fenghuang Guizhou Sheng Kaizhan Chengxin Nongmin Jianshe de Shijian yu Sikao (诚信引来金凤凰——贵州省开展诚信农民建设的实践与思考) (*Trust and Honesty Attracts Fortune: Experience of Guizhou's*

incentives on evaluations of individual rural residents and households that are generated through community monitoring and peer review mechanisms. In a recent effort to upgrade such program, the Qingzhen government also planned to further systemize the operational procedure in such a way that each village will run regular peer review sessions so as to score individual residents' behaviors according to a set of publicized "village norms," and the scores so generated will then go into the local government's basis for distributing agricultural loans, subsidies and multiple types of local and residential benefits.¹⁷¹

"Village norms," as in this context, are adopted through nominally consensus-based, self-governance procedures that have existed for decades in China's rural communities.¹⁷² Such norms regulate matters both within and outside of the ordinary reach of formal law and regulation. Some village norms reiterate legal requirements for observing contractual obligations, family planning regulations, construction, and transportation safety regulations, and the like. Other norms, in contrast, are not of typical government concerns even in China, such as those on "harmony within the

Honest Farmer Project), Qiushi (求是) [SEEKING TRUTH] (Feb. 17, 2012), <http://www.bjcx.org.cn/qxweb/n44926c391.aspx>.

¹⁷¹ Zhili Keji Yinling Shidian Qiang Tuijin Liuxiang Xingdong Baozhang Shidian Chu Chengxiao Qingzhen Shi Zuowei Shengji Shehui Xinyong Tixi Shifan Dian Chuxian Chengxiao ("治理科技"引领试点强推进 "六项行动"保障试点出成效——清镇市作为省级社会信用体系建设示范点初现成效) [Gov Tech Deployed to Produce Result in Qingzhen's SCSP as the Provincial Pilot Program], Qingzhen Shi Renmin Zhengfu (清镇市人民政府) [Qingzhen Municipal Government Site] (Aug. 2, 2017), http://www.gzqz.gov.cn/ztlz/cxjs/201708/t20170802_2595283.html.

¹⁷² Zhonghua Renmin Gonghe Guo Cunmin Weiyuan Hui Zuzhi Fa (中华人民共和国村民委员会组织法) [PRC Village Committee Organization Law](1998), Art. 20. *Also see* Hou Meng (侯猛), *Cungui Minyue de Sifa Shiyong* (村规民约的司法适用), *Falv Shiyong* (法律适用) [LEGAL APPLICATION], no. 6, 2010.

family,” “good neighborliness,” “diligent work ethics,” or against lavish spending on weddings and funerals and littering.¹⁷³ While in recent decades such village norms’ constraining force has become much weaker due to the decline in the political capital of China’s rural governance organizations, the Qingzhen authorities hope to reinvigorate these norms by backing them with high-powered incentives. Beyond Qingzhen, media reports have noticed similar peer review mechanisms for generating reputation information that explicitly reflects on moral behaviors in other rural localities.¹⁷⁴

Incorporation/reinforcement programs as such likely do not exist in the United States. But the essential logic here resembles what used to be theorized in the law and social norms literature, where “normative failure,” meaning that substantive norms whose content reflects community consensus are underenforced, is addressed by government intervention with legal coercion.¹⁷⁵ That said, despite their seemingly straight-forward logic, programs that aim to reinforce moral norms with government-imposed reputation sanctions and rewards could be very tricky in practice as there are

¹⁷³ See Village Norms of Villages in Hongfenghu Township (红枫湖镇), Qingzhen City (unpublished documents and collected through fieldwork, on file with author).

¹⁷⁴ See e.g. Jiejue Nongmin Daikuan Nan de Genben: Jianli Xinyong Tixi (解决农民贷款难的根本: 建立信用体系), Dayue Wang (大粤网) [GD.QQ.COM] (Jun. 5, 2013), <http://gd.qq.com/a/20130605/010253.htm> (reporting on peer review for credit among villagers in Guangdong);

<http://news.163.com/17/0718/05/CPJRVOQC00018AOP.html>; Weihai Gedi Tuijin Chengxin Jianshe Zhidu Hua Rang Chengxin Chixiang Shixin Chikui (威海各地推进诚信建设制度化 让诚信吃香失信吃亏) [Weihai Pushes Forward SCSP to Benefit the Trustworthy and Punish the Trust-breakers], Wenming (文明) [CIVILIZATION WEB] (Mar. 21, 2014),

http://www.wenming.cn/syjswmq/zxjyzt/jj/201403/t20140321_1820557.shtml.

¹⁷⁵ Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 978–79 (1997).

a series of difficult mechanisms that need be straightened out. In idealistic terms, for optimal design and implementation, a program of such kind first has to correctly identify and target the type of “failing” norms that are actually worth backing with government incentives. Otherwise, public resources could be easily spent on supporting norms that are obsolete, inefficient, or even repressive. Second, as government incentives are inserted to induce optimal behavior, it is also difficult to ensure such added inducement is adequate to make a difference and to prevent its incentive effect from being excessive or even perverse. Third, there needs to be practicable and concrete logistics for collecting the behavioral data and running the relevant community review and feedback mechanisms. In particular, if government actors look to tying a greater amount of public resources to reputation information generated through the local communities’ pre-existing crude peer review practices, the risk of biased and untruthful reporting could then loom quite large.

Based on the currently available information, none of the local incorporation/reinforcement programs has thus far succeeded in developing coherent solutions to those issues. In Qingzhen’s case, the local government has contemplated about equipping village communities with IoT sensors and blockchain-based data networks to enable more reliable identification, verification, and tracking of “norm-breaking” behaviors. With facial recognition systems now being deployed by law enforcement authorities in an increasing number of Chinese cities, one can safely expect the same technology to also become applied in the SCSP programs soon.¹⁷⁶ However,

¹⁷⁶ Stanley Lubman has considered the recent trend in facial recognition’s

even if such technological solutions are effectively deployed, that mostly addresses the data collection, storage, and communication issues. The system-design questions, meanwhile, can only be addressed with sound policy choices and hard political judgments as opposed to merely technological solutions.

A more general trend related is the Chinese government's attempt at legislating moral norms. Since 2013, many provincial and municipal governments have either adopted or come rather close to adopt local regulations on "promoting civilized behaviors."¹⁷⁷ Such regulations formally prescribe for norms applicable to a variety of rather petty daily life matters, such as elevator etiquette and doing what Romans do

deployment as relevant under SCSP. *See* Stanley Lubman, *The Unprecedented Reach of China's Surveillance State*, *The China File* (Sept. 15, 2017), http://www.chinafile.com/reporting-opinion/viewpoint/unprecedented-reach-of-chinas-surveillance-state?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+chinafile%2FAI+%28ChinaFile%29. In fact, according to more recent report, law enforcement authorities at many localities have already contemplated a move towards linking pedestrian traffic violation, captured by facial recognition device on public street, with a person's social credit file. *See* Renlian Shibie Xitong Luxu Jiuwei Chuang Hongdeng Jiang Naru Chengxin Zhidu (人脸识别系统陆续就位 闯红灯将纳入诚信制度) [With Facial Recognition Systems Eventually in Place Jaywalking Will be Entered into Credit Record], Souhu (搜狐) [SOHU.COM] (Mar. 24, 2018), http://www.sohu.com/a/226282622_100111304.

¹⁷⁷ *See e.g.* Guizhou Sheng Wenming Xingwei Cujin Tiaoli (贵州省文明行为促进条例) [GUIZHOU PROVINCE CIVILIZED BEHAVIOR PROMOTION REGULATION] (2017); Urumqi Shi Wenming Xingwei Cujin Tiaoli (乌鲁木齐市文明行为促进条例) [Urumqi Civilized Behavior Promotion Regulation] (2017); Qingdao Shi Wenming Xingwei Cujin Tiaoli (青岛市文明行为促进条例) [QINGDAO CIVILIZED BEHAVIOR PROMOTION REGULATION] (2016); Hangzhou Wenming Xingwei Cujin Tiaoli (杭州市文明行为促进条例) [HANGZHOU CIVILIZED BEHAVIOR PROMOTION REGULATION] (2016); Wuhan Shi Wenming Xingwei Cujin Tiaoli (武汉市文明行为促进条例) [WUHAN CIVILIZED BEHAVIOR PROMOTION REGULATION] (2015); Shenzhen Jingji Tequ Wenming Xingwei Cujin Tiaoli [深圳经济特区文明行为促进条例] (SHENZHEN SPECIAL ECONOMIC ZONE CIVILIZED BEHAVIOR PROMOTION REGULATION) (2013).

when being a tourist abroad.¹⁷⁸ While local governments differ slightly in their approaches, they often do not specify in such regulations concrete monitoring mechanisms or impose substantial, if any, legal or administrative penalties on violators. Instead, these regulations indicate that tips and reports on violations are encouraged to come from other citizens, and such information will likely become processed into certain reputation profile systems.¹⁷⁹ These “morality legislations,” therefore, follow the same design logic of the SCSP’s other incorporation/reinforcement programs. One obvious concern arising from such legislations is that they may at times reduce considerably citizens’ practical obscurity with respect to their norm transgressions. Yet the normative evaluation of such effect depends on one’s view about how desirable it may be to increase the level of conformism in a given context.¹⁸⁰

5. Institutionalizing reputation: “Breaking Trust in One Place, Facing Limits Everywhere”

Transforming the regulatory state with reputation is the SCSP’s most ambitious agenda. As we examine China’s approach to institutionalization, information each government body normally collects on regulatory subjects now becomes redesignated,

¹⁷⁸ See e.g. QINGDAO CIVILIZED BEHAVIOR PROMOTION REGULATION, Sec. 13.

¹⁷⁹ QINGDAO CIVILIZED BEHAVIOR PROMOTION REGULATION, SEC. 33 (providing that entities and individuals may report to authorities any uncivilized behavior they may spot).

¹⁸⁰ Consider, for example, if normatively we may feel the same about the following provisions included in a village’s local norms that have been contemplated for being enforced with government incentives through the local SCSP scheme in Qingzhen: 1. Cooperate with village cadres; 2. Provide for seniors at home and discipline underage children; 3. No picketing at construction sites; 4. No lavish banquets other than for weddings and funerals. See Fengshan Village Norms, obtained through fieldwork in Jun. 2017 (on file with the author).

processed and aggregated as reputation information, which becomes shared across multiple government agencies; and based on a particular regulatory subject's reputation profile kept in the government's system, which consists of its past performance in legal and regulatory compliance, such subject will face in the future additional sanctions or rewards from government agencies it previously may not have dealt with. The SCSP is thus trying to change the logic of regulatory practices to resemble closely reputation: A regulatory subject receives prospective regulatory treatment from one authority that takes into account other authorities' past experiences with the same.

Representing such an approach of comprehensive institutionalization are a range of "joint sanction and reward" schemes (hereinafter "**JSRs**") that originated from the previously mentioned judgment defaulter blacklist program run by the court system.¹⁸¹ Under a typical JSR, reputation generated by one government agency on one regulatory subject is shared with other authorities participating in the same JSR; the latter, often upon request by the former, is required to take actions in concert upon the same subject.¹⁸² For example, under the nationwide judgment defaulter blacklist program, the SPC shares its data on blacklisters with over 40 other central government agencies that include essentially every regulator of market and societal affairs,¹⁸³ and these agencies all commit to imposing sanctions within their respective authority against the blacklisted individuals and entities. Among others, firms defaulting on court judgments

¹⁸¹ See *supra* text accompanying notes 144 and 145.

¹⁸² In some JSR programs such two agencies may be referred to as "initiating agency" and "responding agency", respectively. See *Shanghai Report, supra* note 165.

¹⁸³ MEMORANDUM ON IMPLEMENTING JOINT SANCTIONS ON TRUST-BREAKING ENFORCEMENT SUBJECTS, *SUPRA* NOTE 144.

will face restrictions in procuring financing or doing business in the financial sectors, receive more frequent regulatory inspections, and become disqualified from receiving government subsidies or other handouts; individuals will be banned from financial sector and government employment, restricted from obtaining bank credits, prohibited from travelling by air or on high-speed trains, staying in high-end hotels, or playing golf, and their children may not enroll in expensive private schools.¹⁸⁴

Since the Chinese courts' institutional weakness is well known, the court-initiated JSRs are driven by an obvious need to bolster the judiciary's enforcement capacity. But the SCSP in fact envisions a JSR as generally desirable for every government department whose rules and regulation currently do not bite enough. Besides the judgment defaulter blacklists, at the national level there are now four other nationwide JSR programs, targeting respectively the perceived under-enforcement against tax evasions, executive misconduct in listed companies, violation of work and production safety rules, and non-compliance with various types of general commercial market regulations.¹⁸⁵

At the local level, provincial and municipal governments across the country have taken varying approaches to implementing JSRs and similar institutionalization schemes. In some cases, multiple local agencies join forces to crack down on a particular type of regulatory violation. For example, in Huaibei City of Anhui Province, nine government agencies jointly set up a JSR in 2017 that targets employers who

¹⁸⁴ *Id.* at para.19 & 20.

¹⁸⁵ See Info Page on National Credit Information Sharing Platform, NDRC, <http://services.ndrc.gov.cn:8080/ecdomain/portal/portlets/bjweb/newpage/difanggaigewei/xypt.jsp>.

default in bad faith on workers' salaries. Under this regime, delinquent employers are blacklisted and will face restrictions imposed by multiple authorities as they apply or bid for future government projects.¹⁸⁶

In other cases, multiple departments may set up a JSR scheme that covers more than one single regulatory issue. For example, in Tianhe District of the City of Guangzhou, 19 market regulators take part in a local JSR that consists of multiple comprehensive blacklists about local business firms in serious violation of any applicable regulatory rules. According to a local official, a firm blacklisted will become potentially subject to 56 types of sanctions from all 19 agencies in the District.¹⁸⁷ In Shanghai, the municipal comprehensive JSR regime is participated by 24 agencies, and each participating agency in carrying out its own regulatory authorities may request JSR collaboration from other agencies on a particular subject. In the year of 2016, there were 134 reported incidents where the joint regulatory action was initiated by one participating agency, and 171 incidents where an agency took action in response to other agencies' initiations.¹⁸⁸

¹⁸⁶ Anhui Huaibei Chutai Shishang Zuiyan Qianxin Shixin Chengjie Banfa Bumen Lianhe Chengjie (安徽淮北出台史上最严欠薪失信惩戒办法 部门联合惩戒) [*Anhui Huaibei Unveils Stringent Sanctioning Rules Against Defaulters on Worker Compensations with Joint Sanctions Imposed by Multiple Agencies*], Xinyong Zhongguo (信用中国) [CREDIT CHINA] (Sept. 15, 2017), http://www.creditchina.gov.cn/xinyongdongtai/difangdongtai/201709/t20170915_42909.html.

¹⁸⁷ Guangdong Guangzhou Tianhe Qu Qiye Jiang Shoudao 19 Bumen Lianhe Chengjie (广东广州天河区企业将受到 19 部门联合惩戒) [*Business Enterprises Will Become Subject to JSR Set Up by 19 Agencies*], Xinyong Zhongguo (信用中国) [CREDIT CHINA] (Sept. 15, 2017), http://www.creditchina.gov.cn/gonggongwenjianjia/lianhejiangjie/lhjcgzdt/201709/t20170915_34183.html.

¹⁸⁸ *Shanghai Report*, *supra* note 165.

In yet a smaller number of cases, local governments mobilize information resources from all branches to set up comprehensive rating and scoring systems on regulatory subjects as the foundation for their JSR schemes. As earlier noted, Wuxi government's credit reports, which include both behavioral records and government-assigned credit ratings on local business firms, are used by local agencies in regulatory contexts.¹⁸⁹ In Suining county of Jiangsu province, the local social credit program, which had commenced in 2010 and subsequently received international media attention, introduced a social credit rating system with both points and ordinal grades, through which the county government monitors and evaluates the reputation of individual residents.¹⁹⁰ "Honest Qingzhen," as earlier described, also includes one component where the government develops a schedule of rules for assigning reputation scores on both individuals and business entities,¹⁹¹ which are considered as a basis for the distribution of allegedly over 300 types of government resources. Most recently, in 2018, Suzhou and Suqian of Jiangsu Province formally unveiled their respective government program of individual social credit scores, pursuant to which local citizens will receive both numerical scores and letter grades, and these credit evaluations are said to be used in both market and government context.¹⁹²

¹⁸⁹ *Supra* note 147.

¹⁹⁰ Xinyong Pingjia Zhuyao Ying Zhili yu Chengjie Bushou Xinyong (信用评价主要应致力于惩戒不守信用) [*Credit Evaluation Shall Mainly Be Used to Punish Trust Breaking Behaviors*], Sina.com (Jun. 22, 2014), <http://news.sina.com.cn/pl/2014-06-22/053930402006.shtml> (describing the Suining program)

¹⁹¹ QINGZHEN CITY PROVISIONS ON THE ADMINISTRATION OF HONEST AND CREDIT INFORMATION, *SUPRA* NOTE 3.

¹⁹² Jiangsu Suqian Geren Xinyong Shishi Jifen Zhi (江苏宿迁个人信用实施积分制) [*Jiangsu Suqian Implement Personal Credit Scoring System*], Xinyong Zhongguo (信用中国) [CREDIT CHINA] (Mar. 27, 2018),

The absence of strong norms regulating government data practices means that the massive roll-out of these JSRs could increase data risks by virtue of the governments' related aggregation efforts, as well as risks of abuse by government authorities of their newly acquired dataveillance capabilities. Yet the greater concern relating to the JSRs appears to be one about substantive fairness. In the U.S. context, institutionalization initiatives that utilize government data mining and analytics are often worried about for making the state too powerful vis-à-vis individuals, potentially breaking an equilibrium between the two that the U.S. Constitution is often understood to safeguard.¹⁹³ For example, objections to the E-Verify program in the United States are often raised on the ground that it enables the DHS and SSA to use machine algorithms to mine data stored on previously isolated databases and thus more effectively identify suspicious individuals; as a result, work restrictions under the immigration law could potentially become enforced much more rigorously than the society would otherwise be comfortable with.¹⁹⁴

Yet strengthening the state's enforcement capacity is exactly what the Chinese state intends the JSR schemes to achieve. To that end, under the JSR schemes, a regulatory subject now seems to face sanctions or rewards for who he or she is, not what he or she

https://www.creditchina.gov.cn/home/xinyongdongtaituijian/201803/t20180326_111629.html.

¹⁹³ Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011); Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1334-35 (2012) (arguing that in a world of vanishing privacy, a view of the Fourth Amendment as addressing a balance of power between government and the people is more appropriate than limiting it strictly to a right to privacy).

¹⁹⁴ Besides, the E-Verify and similar programs are criticized from other operational aspects, see Hu, *supra* note 70 at 1780-81.

does, and a common worry is that sanctions in particular as a result could risk blowing out of proportion. Besides, one related fairness issue here is that government actors could be tempted to pursue repressive ends through the JSR mechanisms, such as using them to target particular individuals as opposed to their conduct. Indeed, as the comprehensive reputation scoring schemes adopted in the Suining and Qingzhen illustrate, authorities in China may in particular feel little constrained from attempting to use negative reputation scoring to restrain local residents from exercising their rights in making online complaints, filing petitions or even public protests.¹⁹⁵

Besides the substantive concerns, procedural transparency issues are also raised often in this context. Because government data mining in the United States often takes place through classified or semi-classified programs, it is argued that legitimate social interest exist in allowing individuals subjected to government reputation-based decisions to understand and dispute such decisions.¹⁹⁶ That said, as Tal Zarsky examined, determining how much transparency in government data mining is desirable is also highly complex and context-specific, and under circumstances a certain level of opacity could be well required so that legitimate government objectives through data

¹⁹⁵ Guojia Hulian Wang Xinxi Bangong Shi Hulan Wang Gentie Pinglun Fuwu Guanli Guiding (互联网跟帖评论服务管理规定) [NATIONAL INTERNET INFORMATION OFFICE ADMINISTRATIVE RULES ON INTERNET COMMENTARY SERVICES], Sec. 9 (Proscribing that Internet service providers operating sites with user commentary functions must establish user evaluation system to evaluate user commentaries for creditworthiness, keep blacklists against those that have a record of posting illegal contents, and terminate services to users who engaged in serious trust-breaking behaviors).

¹⁹⁶ Zarsky, *supra* note 69 at 1530-31 (2013) (The acts of a liberal and democratic government must, categorically, be as transparent as possible.)

mining are not undermined.¹⁹⁷

Relatively speaking, procedural transparency is of less a concern for the SCSP's institutionalization programs. Unlike the police and national security systems, which obviously run much more sophisticated algorithms with near complete secrecy, the blacklists, red lists, and government-issued rating and scores used in the JSRs are typically generated according to publicized rules and formulas because government actors intend to create behavioral incentives with these rules. Moreover, alongside the implementation of these programs, local legislations now also have included explicit transparency requirements for publicizing rules determining how reputation information becomes linked to government incentives and sanctions under JSRs,¹⁹⁸ as well as previously nonexistent procedural rights for data subjects to query and dispute information in their government credit profiles.¹⁹⁹

Normative issues aside, the SCSP's seemingly radical approach to institutionalizing reputation faces considerable implementation challenge. Despite the self-aggrandizing propaganda by national and local government authorities, there has not been any validation study to systemically support the JSR regimes' actual regulatory effect.²⁰⁰ While similar shortage of convincing evidence for efficacy applies to the U.S.

¹⁹⁷ For example, in national security, law enforcement and anti-fraud contexts, high level of transparency in government targets and criteria could obviously be self-defeating as it enables easy sidestepping of the government operation. *Id.* at 1553-60 (identifying powerful counterarguments against transparency in government's use of predictive algorithms, including primarily that transparency undermines governmental objectives and generates concerns related to stigma and stereotyping).

¹⁹⁸ *See e.g.* SHANGHAI REGULATION, SEC. 22.

¹⁹⁹ *See e.g. ID.* AT SEC. 34.

²⁰⁰ While SPC periodically discloses the aggregate number of subjects on the judgment defaulter blacklists, the number of times these blacklists are denied loan

smart cities programs as well, it is practically even easier to perceive challenges facing the SCSP. For starters, there are notable collective action problems among government agencies in China, which could obstruct both interagency data sharing and coordinated enforcement actions. Government agencies in China so far have manifested a clear interest in hoarding their own “proprietary” data resources than in sharing their possessions with one another. And not surprisingly, JSRs would appeal differently to agencies of inadequate institutional capacities vis-a-vis those that are resourceful or at least self-sufficient. In some local settings, JSRs could even fall apart thanks to inter-agency conflicts in such a form that one regulatory subject is blacklisted by one agency whereas “red-listed” by another.²⁰¹

Moreover, government bodies also face considerable difficulties in designing their rules and formulae for the generation and use of reputation information in the institutionalization contexts. That is particularly true where some ambitious local governments, such as Suining, Qingzhen, and Suqian, became so embolden as to design from scratch their own comprehensive reputation scoring systems. Unlike the more modest JSR schemes aiming to address singular or a limited set of regulatory issues,

applications or travel privileges, and the number of blacklisters that voluntarily performed on the judgment after being blacklisted, no further context was provided to use these numbers for meaningful evaluation of the effect attributable to the JSR. In the most recent working report of the SPC to the National People’s Congress, it was disclosed that the courts have by far publicized information of judgment defaulters for a total of 9.96 times, imposed air travel restrictions for 12.1 million times, imposed high speed train travel restrictions 3.9 million times, and these measures allegedly have incentivized 2.22 million judgment defaulters to fulfill their obligations. Zuigao Renmin Fayuan Gongzuo Baogao (最高人民法院工作报告) [*Work Report of the SPC*], Xinhua (新华网) [XINHUANET] (Mar. 25, 2018), http://www.xinhuanet.com/politics/2018lh/2018-03/25/c_1122587194.htm.

²⁰¹ For example, a firm may well be “red-listed” by tax authorities whereas blacklisted by environmental protection agencies or work safety regulators.

which are relatively easier to design and implement, running a comprehensive government reputation scoring system that does not end up assigning points and computing scores in obviously crude and arbitrary ways often exceeds local government authorities' sophistication and capacity.²⁰² To use Qingzhen's point system as an example, its scoring formula that consists of over 1000 pieces of criteria was generated through no more rigorous process than aggregating suggestions from different sectoral departments, each of which makes a list of regulated behaviors and assigns how many points should be deducted or added when such behavior is found and entered into official record. One does not see any coherent logic, for example, in how points are assigned under such system to different behaviors, and there is most likely no logic at all to deduct five points for hiring child worker whereas 10 points for selling coal product that does not meet regulatory standard for quality. And there has been neither test run nor validation studies on such system's actual effect. Consequently, as anecdotes collected in the field may suggest, the scoring system, for its crude and arbitrary nature, has generally been worked around on an *ad hoc* basis by local authorities who often try to be pragmatic; that in turn also causes local residents to take the scoring system much less seriously than government propaganda claim that they do.

²⁰² Based on information gathered from fieldwork in Qingzhen, the formula for its point system, which span over 1000 pieces of criteria, was generated by simply aggregating suggestions from different sectoral departments, each of which makes a list of behaviors that are subject to a particular regulation and assign how many points should be deducted or added if such behavior is found and entered into official record. There are obviously many problems with a comprehensive point system generated through such a process. For example, one does not see any coherent logic in the way points are assigned to different behaviors, and there's most likely no logic at all to deduct 5 points for hiring child worker whereas 10 points for selling coal product that does not meet regulatory standard for quality. There is no test run for the system, and no validation studies on actual effect through independent or commissioned research.

6. Government internal control with reputation

The Chinese authorities view reputation as not only a governing tool it can apply to regulate the market and the society. It also expects reputation to play important roles in policing the behavior of government agencies and officials. For starters, the SCSP's searchlight by design is intended to cast on not only private sector but also government actors.²⁰³ Besides reiterations of textbook government transparency requirements, some more novel initiatives included in the SCSP call for the generation and publication of public sector information about the credit status of government agencies and officials, especially in relation to how well they perform contractual obligations in financing, government procurement, project investment and similar transactional contexts.²⁰⁴ News media reported that as of April 2017 about 470 local government bodies nationwide had found their names publicized on the SPC's judgment defaulter blacklists.²⁰⁵ As required under the SCSP policy documents, such "trust-breaking records" for governments and officials are to be made publicly available in even more systematic fashion, such as through government credit information portals that allow general searches and inquiries by the public.²⁰⁶ That said, since again the SCSP's

²⁰³ Government transparency initiatives in China predates OGD. While many see OGD as a natural outgrowth of government transparency, others believe these two in China are mutually distinguishable from each other.

²⁰⁴ Guowu Yuan Guanyu Jiaqiang Zhengwu Chengxin Jianshe de Zhidao Yijian (国务院关于加强政务诚信建设的指导意见) [STATE COUNCIL GUIDING OPINION ON ENHANCING TRUST AND CREDIT IN GOVERNMENT AFFAIRS] (2016) (hereinafter "**2016 GOVERNMENT CREDIBILITY OPINION**"), Part II.4.

²⁰⁵ Duodi Xian Zhengfu Bei Naru Quanguo Shixin Bei Zhixing Ren Mingdan (多地县政府被纳入全国失信被执行人名单) [*Many County Governments Were Listed As Trust-Breaking Enforcement Subjects*], Zhongguo Wang (中国网) [CHINA.COM] (Apr. 4, 2017), http://www.china.com.cn/cppcc/2017-04/04/content_40554222.htm.

²⁰⁶ 2016 GOVERNMENT CREDIBILITY OPINION, PART IV.2 (directing that credit

searchlight strategy focuses on specific reputation information over the general release of raw data, its plausible effect in enhancing transparency could be limited by the fact that the government enjoys considerable leeway in selectively releasing data for their own instrumental, as opposed to public accountability, gains.²⁰⁷

Some other SCSP policy proposals apply the incorporation strategy upon government actors. These proposals encourage reputation information on government and official behaviors to be generated from the outside reputation market. Besides calling for strengthening conventional mechanisms for “societal oversight” on government conduct, such as through petitioning and whistleblowing, the SCSP makes governments at all levels to support outside credit agencies and research institutions to produce and publicize reputation scores and ratings on government bodies.²⁰⁸ These third-party ratings, together with credit profiles on government bodies and officials compiled internally, are to be considered by higher authorities in evaluating the performance of their subordinate agencies and officials.²⁰⁹ As of this writing, however, other than in the specific context of local government bond market where ratings are

information about government bodies and officials be publicized through Credit China website and other platforms).

²⁰⁷ As Yu & Robinson correctly note, “open government” and “open data” do not have to be the same pursuit, and a state can selectively release data for instrumental purposes while also operating in an opaque and hence less accountable mode. Harlan Yu, David G. Robinson, *The New Ambiguity of “Open Government,”* 59 UCLA L. REV. DISCOURSE 178, 181 (2012).

²⁰⁸ 2016 GOVERNMENT CREDIBILITY OPINION, *SUPRA* NOTE 204 AT PART III.3 (directing the establishment of third party evaluation mechanisms on government credit performance as a way to allow greater societal supervision on government bodies and officials).

²⁰⁹ *Id.* at Part IV.3 (noting that government bodies with trust breaking record will be required to formally explain the situation to their superiors and the relevant bodies and officials will be subject to a range of internal, negative administrative consequences).

constantly issued for public sector issuers,²¹⁰ no such third party ratings on government agencies and officials are known to exist,²¹¹ even though many government authorities have announced their support for such initiative.²¹² The absence of concrete progress in this front again tellingly reveals that China's government actors have only limited interest in incorporating private reputation for their own decisionmaking activities.

Besides using searchlight and incorporation strategies, the SCSP also aspires to institutionalize reputation into the government's internal oversight and discipline systems. Many of the previously described JSRs are also made to apply to government authorities' regulatory subjects. Most importantly, credit profiles established through the SCSP on government bodies and individual officials are expected to be used by higher authorities in reviewing the subsidiaries' performance and making funding, promotion and other similar decisions.²¹³

²¹⁰ See e.g. *China Opens Local Bond Ratings to Global Agencies*, REUTERS (Jul. 4, 2017) <https://www.reuters.com/article/china-bonds-ratings-idUSL3N1JV19E>

²¹¹ Note that there are various types of rankings of cities along different parameters of social, economic and governance performances, generated by both government and social entities, but they are not exactly what the SCSP refers to when it elaborates on measuring "government honesty." The closest ranking is one run by the government-controlled National City Credit Monitoring Platform, which ranks cities for how they have operated their respective local social credit systems. See Quanguo Chengshi Xinyong Zonghe Zhishu Paiming Beijing Diyi (全国城市信用综合指数排名: 北京第一) [Beijing Ranked No. 1 on Nationwide City Credit Composite Index], Xinyong Zhongguo (信用中国) [CREDIT CHINA] (Sept. 22, 2017), http://www.creditchina.gov.cn/xinyongdongtai/difangdongtai/201709/t20170922_45885.html.

²¹² See e.g. Shaanxi Sheng Renmin Zhengfu Guanyu Yinfa Sheng Shisan Wu Shehui Xinyong Tixi Jianshe Guihua de Tongzhi (陕西省人民政府关于印发 省“十三五”社会信用体系建设规划的通知) [SHAANXI PROVINCIAL PLAN FOR SCSP DURING THE THIRTEENTH FIVE YEAR PLAN PERIOD], PART IV.4 (Expressly supporting third party agencies to evaluate government credibility and publicize results).

²¹³ 2014 BLUEPRINT, PART II.1 (stating the plan to establish credit profiles for public officials that will become used as a basis for the evaluation, promotion, sanction and reward decisions on individual officials).

Indeed, similar oversight and human resource management practices have existed in China's government systems long before the SCSP. More recently, as part of the progress in China's e-government projects, local governments have also adopted a combination of computerized surveillance and incentive structures for internal management purposes, which are found to have a positive effect in reducing corruption and increasing government efficiency.²¹⁴ What the SCSP now aims to bring to these pre-existing internal control practices are new types of information that triggers an even wider array of disciplinary incentives on agencies and officials. Although many types of sanctions imposed on private defaulters cannot be applied to the similarly blacklisted government defaulters, individual officials blacklisted now face consequences not only within the bureaucratic system, such as reprimand, negative evaluation, ineligibility for honors and awards, demotion and even discharge, but also outside of it, such as restrictions on travel and real property purchases.²¹⁵ In such ways, the SCSP augments the internal oversight and incentives upon agencies and officials.

The actual effect of these reputation-based internal control initiatives is yet to be seen. After all, while the Chinese government has claimed seeing results for its aggressive anti-graft campaign during the past years,²¹⁶ it did not really rely much on

²¹⁴ JESPER SCHLAEGER, *E-GOVERNMENT IN CHINA: TECHNOLOGY, POWER AND LOCAL GOVERNMENT REFORM* 67-75 (2013).

²¹⁵ Wu Mengda et al. (乌梦达等) *Toushi Quanguo Fayuan Yu Qianjian Guanyuan Shixin An de Beihou* (透视全国法院逾千件“官员失信”案的背后) [*Looking Through Over One Thousand Government Trust Breaking Cases in Courts Nationwide*], Xinhua (新华) [XINHUANET.COM] (Nov. 20, 2016), http://news.xinhuanet.com/legal/2016-11/20/c_1119949036.htm (reporting local cases where individual officials being subject to sanctions based on their reputation record).

²¹⁶ *Commentary: China Won't Let Up in Fight Against Corruption*, Xinhuanet (Nov. 24, 2017) http://news.xinhuanet.com/english/2017-11/24/c_136776870.htm (noting

the SCSP-related novel monitoring and control arrangements during that process. And given that the searchlight and incorporation strategies imply considerable utilization of information and enforcement resources outside of the government, one may doubt if many government actors will become comfortable with seeing much of these external inputs introduced into their internal disciplinary process.

C. *Summary: The Reputation State's China Model*

The existing literature has not systematically examined the emerging reputation state in the Western context. This Article in Part II has pointed to one useful direction towards understanding the many related institutional developments, which is to look into the several basic types of strategies government actors may pursue as it explores using reputation for law and governance. This Part III, as it presents a comprehensive descriptive account of China's SCSP, further sheds light on a new model in which the rise of the reputation state could potentially take place. In particular, using the neoliberal policy approaches adopted by U.S. government actors as a comparative baseline, one may clearly discern the several distinct features of the reputation state's China model as embodied in the SCSP. First, compared with the U.S. government actors' generally reactive, regulation-oriented approaches, the Chinese state intends to play a much more assertive role in directing the course of development for the country's nascent reputation market. Second, while the U.S. government actors in pursuing searchlight

that "remarkable results have been achieved" in China's anti-corruption campaign over the past five years).

strategies rely more on mechanisms of general information sharing, such as FOIA and OGD regimes, China instead tasks government actors to generate and disseminate specific types of reputation, including in such processed forms as scores and ratings. Third, when incorporating private reputation into the public decisionmaking process, U.S. government actors focus more narrowly on the expansion of surveillance for sources of information, whereas China through the SCSP intends to not only draw on outside information but also insert public coercive power into areas that are traditionally beyond the state's practical reach. Fourth, compared with the U.S. governments' often covert application of inter-agency data sharing, data mining, and predictive analytics, the Chinese authorities seek to overtly institutionalize reputation into its regulatory apparatus in order to comprehensively improve efficiency and compliance.

Overall, the reputation state's China model diverges from the neoliberal paradigm in that it aspires for much greater and more direct state involvement and control over how "reputation" is to be specifically defined in the governance context and what specific effect reputation mechanisms should operate to achieve. Although the SCSP also includes conventional regulatory measures that lend support to the reputation society, these measures are intermediary in nature as they ultimately serve the state's interest in empowering its own formal institutions of law and government.

The reputation state's China model, as Western observers have typically critiqued, indeed raises the familiar set of privacy, fairness and other civil liberty issues. In particular, many have also worried that the Chinese state's inherent repressive impulse and the lack of effective institutional constraints on government power means that

greater risk of abuses and overreaches may ensue as the authorities, through the SCSP, can expect to acquire more capacious surveillance and control techniques.²¹⁷

Despite these concerns, this Part's descriptive account also reveals that the ambitiously framed SCSP has faced significant challenges to its effective implementation. The authorities have so far been unable to develop a coherent plan as to how they may tackle the increasing complexities in both promoting and regulating the country's nascent reputation market. Although government actors intend their blacklists, ratings and scores to carry salient signals and generate a specific behavioral effect, the actual utility of such government-generated reputation to market players is questionable. And while Chinese government authorities are entrepreneurial enough to pursue more radical forms of incorporation and institutionalization strategies, there is no clear indication about how they could overcome the various design and implementation difficulties as a practical matter. These pragmatic hurdles, in fact, point important directions for a more nuanced understanding of the SCSP, its related issues, and its potential implications.

IV. THE POLITICAL ECONOMY OF SOCIAL ENGINEERING

What explains China's latest turn to reputation for governance strategies? Conceivably, a government project as ambitious and multifaceted as the SCSP must be the product of input from diverse interests and institutional forces. Part III's descriptive account, along the way, has noted some of these interests and forces. This Part IV

²¹⁷ See e.g. *supra* note 14.

presents a stylized theoretical account, focusing on four general groups of government and private interests at play, which I informally label as “developmental,” “authoritarian,” “bureaucratic,” and “business,” respectively. The main observation here is that the design and the implementation of the SCSP’s policy initiatives are driven by these strands of government and private interests, which both overlap and compete with one another. Understanding such background dynamics of the political economy helps further illuminate on both the SCSP’s ambitious contours as well as the challenges facing the reputation state’s China model.

A. Developmental Interests

“Developmental interests” of government actors here is broadly defined to be inclusive of their interests in taking policy measures with a view to improving economic performance and public welfare within their jurisdictions. As overviewed in Part III, the SCSP consists of policy initiatives that serve the Chinese ruling regime’s current developmental interest as the country, striving to avoid the so-called “middle-income trap,”²¹⁸ faces mounting pressure in recent years to reform its market and government systems.

1. Interest in market reform

The Chinese state’s need for market reform as an underlying motivational factor for the SCSP is easy to see. As the country’s pace of economic growth has notably slowed down since 2012 due to languishing external demand, the central policymakers

²¹⁸ *China 2030: Building a Modern, Harmonious, and Creative Society*, WORLD BANK (Feb. 27, 2012), <http://www.worldbank.org/en/news/feature/2012/02/27/china-2030-executive-summary>.

understood that sustainable future growth will have to rely on structural market reforms to exploit potentials in domestic investment and consumption.²¹⁹ Expanding access to financing for SMEs and consumers thus seems the natural strategy, and credit expansion, in turn, is predicated on the further development of a market for functional credit systems that can effectively serve these traditionally under-financed parties thanks to the government's stringent control over the banking system.²²⁰ In that vein, while the bulk of the SCSP's "market making" initiatives in the credit and financing can be viewed as the PBOC's unfinished business from more than a decade ago, the recent momentum is ostensibly driven by this new urgency arising from the state's general adjustment in its economic developmental agenda.

Beyond finance, there is also an intuitive economic rationale for China's developmental state to favor and promote private sector reputation systems. The SCSP policy documents pronounced that the Chinese government considers reputation systems as an economically useful mechanism to ameliorate many market irregularities attributable to asymmetric information and the resulting lack of trust between transaction parties.²²¹ As it diagnoses that reputation has long been undersupplied in the market, the state has expressed a general intent to support the development of private reputation systems through directing their use, setting standards, laying out the basic regulatory framework, and subsidizing with public sector information and

²¹⁹ *Id.*

²²⁰ Shen, *supra* note 80.

²²¹ 2014 BLUEPRINT, PART I.2 (noting that the SCSP is a necessity as it serves the purpose of improve efficiency and order for the development of the market economy).

incentives.²²² Such intent should be viewed as genuine in the sense that, at least before any uniform, fully government-controlled substitute becomes available, the state presumably welcomes the opportunity of capitalizing on any efficiency gains generated by privately operated reputation systems.

It is worth underscoring here that recent legal and regulatory developments in data privacy should be considered as part of the Chinese government's market reform agenda as well. Since the 1980's it has been well-established practices for the Chinese government to "construct accompanying legal and regulatory infrastructure" when it attempts at promoting novel types of market operations, and such practices are premised on the notion that at least some baseline rules are a necessity for developmental purposes.²²³ While the debate is far from settled about how robust a data privacy regime is optimal for China, as an official stance the authorities have increasingly recognized that a data regulation regime offering stronger baseline protections than the status quo is indispensable.²²⁴

Specifically, as earlier noted, the rise of the reputation market itself may have contributed to the shift in societal attitudes and preferences in China with respect to reputation-related data practices. The Chinese public traditionally is more receptive than their Western counterparts to reputation ratings and rankings, due likely to both a

²²² 2014 BLUEPRINT, PART III.

²²³ More background on the general developmental trend towards "legalization" of governance in China, see Randall Peerenboom, *More law, Less courts: Legalized Governance, Judicialization and Dejudicialization in China*, in ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES 176-182 (TOM GINSBURG & ALBERT H. Y. CHEN (EDS.), 2008)

²²⁴ 2014 BLUEPRINT, PART V.5.

general cultural leaning towards meritocracy²²⁵ and specific recent memory about, and thus familiarity with, the widespread government dossier and evaluation systems on individuals.²²⁶ Nonetheless, some of the more aggressive new social credit programs, such as those of Suining county and Sesame, have already started to generate considerable controversies as they vividly illustrate how systemized reputation may pose threats to autonomy and fairness.²²⁷ Since the government has taken note of such rise in public awareness of these issues,²²⁸ a genuine developmental interest in responding to these problems of negative externalities in the reputation market could

²²⁵ The Chinese ideology of meritocracy is commonly understood to have originated from the Confucian socio-political philosophy that elevates knowledge, skill, and virtue as the primal criteria for selecting members of the ruling class. In the otherwise hereditary Chinese imperial dynasties, since the seventh century, the competitive civil service examination run by the imperial court on subjects of literary classics had long been a major avenue for “capable and virtuous” individuals to rise to high places. In contemporary China, one’s performance at all kinds of state-administered examinations remains also a predominant, if not sole determinative, factor to his or her schooling and working opportunities. See YE LIU, HIGHER EDUCATION, MERITOCRACY AND INEQUALITY IN CHINA (2016). Against such background, Chinese people are more inclined to take for granted that some type of scoring and ranking could apply to many aspects of their life concerns. And for the purpose of both honoring the excellent performers and demonstrating transparency of the examination process, it has long been the practice since the imperial times that scores of most exams will be publicized to the whole society. The FERPA-style privacy issues have been discussed since early 2000’s in the context of the conventional practice in primary and secondary schools to public post student test scores and rankings on billboards on campus. In a small number of localities such as Shanghai such practice has been banned since 2005, but nationwide there is no uniform legislation on this matter. See Ding Wei (丁伟), Shanghai Shi Weichengnian Ren Baohu Tiaoli Lifa Touxi (上海市未成年人保护条例立法透析) [*Perspectives on the Shanghai Regulation on the Protection of Minors*], Qingshaonian Fanzui Wenti (青少年犯罪问题) [JUVENILE DELINQUENCY ISSUES], no.1, 2005 at 6.

²²⁶ See HONG YUNG LEE, FROM REVOLUTIONARY CADRES TO PARTY TECHNOCRATS IN SOCIALIST CHINA, CH.13 (1990)

²²⁷ Commercial social credit systems such as Sesame Credit, meanwhile, are also increasingly subject to skepticisms over possible biases in its rating algorithms.

²²⁸ See *supra* note [92] (PBOC official Wan Cunzhi noting the importance of data protection in the development of the consumer credit information service market).

well be underlying the authorities' recent steps taken towards laying down a set of baseline data privacy and security rules.

2. Interest in government reform

The Chinese state's need for novel approaches to government reform is another developmental interest that motivates the SCSP. Effective public administration and legal order are commonly understood as key to a successful developmental state. The internal perspectives on how China's contemporary governmental system and practices are inefficacious most often focus on two shortfalls. First, government and legal authorities in China are viewed as not effectively using their "sticks." Although hundreds of thousands of laws and regulations have been enacted since the beginning of China's economic transition in the late 1970s, many that are purported to constrain socially costly or harmful activities have failed to impose meaningful behavioral constraints due to their laxity in enforcement.²²⁹ The most representative and notorious example, as aforementioned, concerns the judicial system's enforcement of court decisions; despite waves of efforts to reform the judiciary, the "enforcement conundrum" continues to be acknowledged as a key challenge facing China's court system.²³⁰

²²⁹ Xi Jinping (习近平), Guanyu Zhonggong Zhongyang Guanyu Quanmian Tuijin Yifa Zhiguo Ruogan Zhongda Wenti de Shuoming (关于〈中共中央关于全面推进依法治国若干重大问题的说明〉) (On CCP Central Committee's Explanations on Several Important Issues in Relation to Comprehensively Advancing the Rule of Law), Xinhua Wang (新华网) [XINHUANET] (Oct. 28, 2014), http://news.xinhuanet.com/politics/2014-10/28/c_1113015372_2.htm (noting that the key issue with respect to China's rule of law project has shifted from the lack of legislation to the inadequate enforcement of laws already enacted).

²³⁰ See e.g. Jiang Bixin (江必新), Lun Guojia Zhili Xiandaihua Beijing Xia Zhixing Nan Zhi Pojie (论国家治理现代化背景下执行难之破解)[*On Solving the Enforcement Difficulty Problem Under the Backdrop of Modernizing the State's Governance*], Zhongguo Yingyong Faxue (中国应用法学) [CHINA REVIEW OF

Second, government authorities in China are also perceived as not efficiently distributing the many carrots they possess. In allocating a range of government resources of positive incentives, whether in the form of cash handouts, awards, policy benefits, and subsidies, or preferential treatments in administrative licensing and qualification decisions, crude and arbitrary allocative decisions are constantly observed. For example, the national government has underscored in recent years that the allocation of government resources, in particular in such contexts as distributing poverty relief handouts and agricultural subsidies, should be “targeted and precise” (*jingzhun*).²³¹ Nonetheless, as a practical matter, the difficulties for the central government to control waste and corruption on the ground has long proven daunting.²³²

These perceived problems in China’s legal and regulatory apparatus are often

ADMINISTRATION OF JUSTICE], no.2, 2017 at 1 (noting that, in 2017, the situation with Chinese courts’ enforcement conundrum had improved but significant challenges remained). In 2016’s work report to the National People’s Congress, the SPC Chief Justice Zhou Qiang announced that the court system’s goal was to “basically resolve” the enforcement conundrum within “two to three years,” leveraging, among others, the court systems’ improved ICT capacities and the seamless “heaven’s web” of JSR mechanisms. *See* Wang Xiaomei (王小梅), Fayuan Zhixing Xinxihua Jianshe de Chengxiao Wenti: yi Renmin Fayuan Jiben Jiejue Zhixing Nan wei Beijing (法院执行信息化建设的成效、问题——以人民法院“基本解决执行难”为背景) [Achievements and Problems in the Court System’s Informatization Project Against the Background of People’s Courts’ Endeavor Towards “Basically Resolving the Enforcement Conundrum”], *Zhongguo Yingyong Faxue* (中国应用法学) [CHINA REVIEW OF ADMINISTRATION OF JUSTICE], no.1, 2018 at 8-9, 17-18.

²³¹ Facts & Figures: China’s Fight Against Poverty, XINHUANET (May 24, 2017), http://news.xinhuanet.com/english/2017-05/24/c_136311122.htm (noting that Chinese authorities have stressed the use of targeted and precise poverty relief measures).

²³² Li Bo & Zuo Ting (李博 左婷), Shei Shi Pinkun Hu? Jingzhun Fupin Zhong Jingzhun Shibie de Guojia Luoji yu Xiangtu Kunjing (谁是贫困户? 精准扶贫中精准识别的国家逻辑与乡土困境) [*Who May Qualify as Poor Households? The Statist Logic and Rural Society’s Conundrum in Precise and Targeted Poverty Relief*], *Xibei Nongli Keji Daxue Xuebao* (西北农林科技大学学报: 社会科学版) [NORTHWESTERN A&F UNIVERSITY JOURNAL: SOCIAL SCIENCE EDITION], no. 4, 2017 at 1-7.

thought as an important cause of the widely perceived deficit in “trust and honesty” in the Chinese society, which manifests itself in the prevalent frauds, transgressions, and corruption in government affairs, business and market transactions, court and justice systems, and other areas of social interactions.²³³ Although the SCSP policy documents broadly frame these problems in moral terms, the authorities are obviously not just counting on propaganda and social meaning creation to fix them. Instead, the Chinese government has identified and aimed to address three general pathologies underlying these failures in governance and regulation.

First, although continued investment in government ICT has equipped a growing number of government bodies in China with more sophisticated systems and applications, the operational efficacy of China’s government information and data practices still has considerable room for improvement. Till this day, not only is there still a “digital divide” among government bodies from regions and localities with considerably varying levels of economic development,²³⁴ but the persistent problem of “information silos” still causes significant internal transaction cost within the government system and leads to inefficiencies in the delivery of public services and administering policies.²³⁵

²³³ See 2014 BLUEPRINT, PART II.1 (noting that government efficacy and credibility is critical to improving trust and honesty in other areas).

²³⁴ See e.g. D. Wang, *The Problem of the Digital Divide in the Development of E-Government and Countermeasures*, 850 ADV. MATER. RESEARCH 401 (2014).

²³⁵ In the Chinese context the problem is also commonly referred to as “isolated information islands.” See X. Y. Yang and Q. Jiang, *Eliminating the Information Isolated Island of EG System - A Case Study of CIQ*, 263-266 *Applied Mechanics and Materials* 2708 (2013). See also Guowuyuan Bangongting Guanyu Yinfa Zhengwu Xinxi Xitong Zhenghe Gongxiang Shishi Fangan de Tongzhi (国务院办公厅关于印发政务信息系统整合共享实施方案的通知) [STATE COUNCIL NOTICE ON THE

Second, besides deficiencies in their technical infrastructure and capabilities, many government actors are constrained in other aspects of resources required for undertaking their regulatory functions. Specific agencies responsible for enforcing laws and regulations at the front line, such as business administration, environmental protection, food safety and tax authorities, as well as local government officials in rural villages and counties, constantly complain about being understaffed, underfunded, or not being given the necessary authorities to use coercive power.²³⁶

ISSUANCE OF PLAN FOR INTEGRATING AND INFORMATION-SHARING AMONG GOVERNMENT INFORMATION SYSTEMS] (2017) (noting that till 2017 the problem of information silos within the government system has not been effectively resolved). Citizens and firms in China have long complained, for example, about the cost and hassle they face in trying to comply with redundant and/or conflicting data collection and verification requirements when they have to deal with multiple government authorities for licenses, approvals, certifications and obtaining government services. Notoriously, see Zhengming Nima Shi Nima Cheng Xiaohua Pandian Naxie Qipa Zhengming (证明“你妈是你妈”成笑话 盘点那些“奇葩证明”)[*Ridiculous Requirements for A Citizen to Verify Identity of Her Mother Being Her Mother*], Renmin Wang (人民网) [PEOPLE.CN] (May 7, 2015), <http://politics.people.com.cn/n/2015/0507/c1001-26964483.html> (reporting that because of the lack of information sharing among different government bodies citizens often have to fulfill repetitive and often unreasonable documentation and data collection requirements when dealing with government agencies in routine contexts). Meanwhile, many reported incidences also show that individuals take advantage of the lack of interagency sharing among government departments to commit frauds in claiming for a range of government benefits and subsidies. In an extreme case, a man was able to register marriage with different women in four locations, thanks to the lack of linkage among the local government databases for marriage records. Lu Chang (鲁畅), Chonghun Nan Qu Si Qi Zhengfu Shuju Pingtai Gai Ruhe Wanshan (重婚男娶四妻 政府数据平台该如何完善) [Polygamous Man Married Four Wives: How Should Government Data Platforms Become Improved?], Zhongguancun Zaixian (中关村在线) [ZOL] (Apr. 16, 2016), <http://bigdata.zol.com.cn/578/5783017.html>. That said, it should be noted that effective interagency communication cannot be taken for granted in the U.S. context either. Healthcare sector is the focus of the US discussion. See AR Miller & C Tucker, Health Information Exchange, System Size and Information Silos, 33 J. Health Econ. 28 (2014).

²³⁶ See e.g. Chen Baifeng (陈柏峰), Jiceng Shehui de Tanxing Zhifa Ji Qi Houguo (基层社会的弹性执法及其后果) [*Flexible Law Enforcement in Local Societies and Its Consequences*], Fazhi yu Shehui Fazhan (法制与社会发展) [LAW & SOCIAL DEVELOPMENT], no. 5, 2015.

Third, that laws and regulations in China do not work as well as intended is also attributable to the usual agent-control problems, such as corruption, arbitrariness, shirking, or simply incompetence on the part of lower-level government bodies and their officials.²³⁷

These pathologies should be generally familiar to students of law and government in low-income and middle-income countries.²³⁸ In China's case, the SCSP apparently includes direct responses to these issues: It addresses the deficiencies in government information technology and data practices by investing in better ICT infrastructure, incorporating external sources of information, and promoting and facilitating inter-agency data sharing; it tackles the problem of regulatory under-enforcement by both mobilizing private sanctions and pooling resources of multiple public agencies; and it approaches the government integrity and competence problems by incorporating certain data-driven and automation decision techniques, and bolstering external and internal oversights on government behaviors.

In this vein, the SCSP reflects China's continued interest in exploring plausible technocratic solutions to modernizing its "governing capabilities."²³⁹ Importantly, however, while China's developmental approach through the SCSP is largely technocratic, unlike many have suggested, it is not merely about the deployment of ICT, but involves a notable attempt at rearranging its institutional resources.

²³⁷ See generally HOLDING CHINA TOGETHER (Barry J. Naughton & Dali L. Yang eds., 2004)

²³⁸ See LAW AND DEVELOPMENT OF MIDDLE INCOME COUNTRIES: AVOIDING THE MIDDLE-INCOME TRAP (Randall Peerenboom & Tom Ginsburg (eds.), 2014)

²³⁹ See Creemers, *supra* note 15 at 2.

B. Authoritarian Interests

Western observers most commonly subscribe to a motivational theory for the SCSP that centers upon the Chinese Party-state's interest in solidifying its political control and containing its opponents and challengers.²⁴⁰ Here I refer to such motivation loosely as the ruling regime's "authoritarian interests." While the presence of authoritarian interests in the SCSP's design and implementation is undisputed, some further clarification is useful with respect to what they exactly entail in this particular context.

For starters, given that the Chinese state imposes general and visible restrictions on certain realms of individual liberties, and it from time to time practices both overt and tacit crackdowns on dissidents, there is no reason why it will choose not to apply to such same end the augmented capabilities in surveillance, data mining and inter-agency coordination that it expects to acquire through the SCSP. Indeed, in designing their public reputation systems some local governments, such as the aforementioned Suining County, already attempted at using reputation scores to strengthen restrictions on certain liberty and autonomy interests of individuals, including those relating to online speech and public demonstrations.²⁴¹ In a more recent example, the national

²⁴⁰ See e.g. Chin & Wong, *supra* note 14; Lubman, *supra* note 176. In the related context about China's e-government development, it has been more generally argued that China's Leninist system is oriented to deploy technologies in radically different ways from western democracies. See SCHLAEGER, *SUPRA* NOTE 214 AT 26.

²⁴¹ Liu Weiwei & Xia Peng (刘巍巍 夏鹏), Jiangsu Suining Gei 114 Wan Shimin Ding Xinyong Dengji (江苏睢宁给 114 万市民定信用等级) [*Jiangsu Suining Rates Credit Levels for 1.14 Million Residents Whose Scores May Be Reduced For Making False or Unreasonable Petitions*], Renmin Wang (人民网) [PEOPLE.COM.CN] (Jun. 20, 2014), <http://politics.people.com.cn/n/2014/0620/c1001-25179077.html>.

Internet content regulator issued a new rule in August 2017 that requires online media operators to establish a blacklist for web users who author “inappropriate” posts.²⁴² Further, for the incorporation/reinforcement initiatives aimed to insert government incentives to back moral norms, the broadly phrased requirements for ideological commitments to the party line could become part of the “moral” norms and forcefully imposed upon individuals.²⁴³ In sum, from the state’s perspective, the reputation techniques should look clearly a promising tool for augmenting its control over and pressure against activities it finds objectionable.

One point to note is that the SCSP may usefully serve the Chinese state’s authoritarian interests through not only the practical deterrence mechanism, premised on the state’s enhanced surveillance capabilities and high-powered incentives, but also the expressive mechanisms. As noted, the word “credit” (*xin*) in the Chinese language carries a thick moral valence, and the state deliberately seeks to soften the image of political control by appealing to the generally favorable cultural attitudes towards this moral idea. That helps explain why so many legal and regulatory reform agenda tenuously related to a narrower definition of credit and reputation have become squeezed into the SCSP. In addition, regardless of whether the SCSP actually enhances the state’s surveillance and control capabilities, the appearance of the state employing

²⁴² See NATIONAL INTERNET INFORMATION OFFICE ADMINISTRATIVE RULES ON INTERNET COMMENTARY SERVICES, *supra* note 195.

²⁴³ 2014 BLUEPRINT, PART III.1 (Proposing that, as part of the SCSP, “moral forum” should be established and utilized to promote officially enshrined moral values). As of this writing there has not been any widely publicized incidents about individuals facing government-backed reputation sanctions for exercising rights or deviating from party lines.

sophisticated social control tools, such as big data and predictive analytics, is likely expected to help create the effect of a “security theater” and achieve a certain level of symbolic deterrence.²⁴⁴

Skeptics may question if these expressive agenda are too far-fetched. But in a practical sense, such interest could actually have been an important driver. In fact, one notable institutional arrangement for the SCSP’s design and implementation may best be explained by referencing the state’s interest in such expressive control mechanism: At both the national and local levels, alongside the NDRC agencies in charge of economic policy and regulatory affairs, the party propaganda departments are the other player who has been heavily involved in the design and implementation work in connection with the SCSP programs.²⁴⁵

Importantly, the Chinese Party-state’s authoritarian interests should not be considered as absolutely separate or divergent from its developmental interests. Instead, these two sets of motivations often overlap because the contemporary Chinese regime’s claim to legitimacy has been generally predicated on its capabilities to deliver economic development and welfare improvement.²⁴⁶ If the SCSP generates efficiency gains

²⁴⁴ Zarsky posits that on rare occasions the government may use predictive modeling or similar tools, futile however, to lead the public to wrongly believe they are effective. Zarsky, *supra* note 69 at 1568.

²⁴⁵ Central Propaganda Department and the Central Civilization Office are both party to the SCSP Joint Ministry Conference. Observation from our fieldwork also confirms these propaganda agencies’ leading roles in the working process for implementing the SCSP at localities.

²⁴⁶ Hongxing Yang & Dingxin Zhao, *Performance Legitimacy, State Autonomy and China's Economic Miracle*, 24 J. CONTEMP. CHINA 64 (2015). Further discussion of such performance-based legitimacy for the Chinese state in a broader historical context, see Dingxin Zhao, *The Mandate of Heaven and Performance Legitimation in Historical and Contemporary China*, 53 AM. BEHAV. SCIENTIST 416 (2009).

through bringing about positive reforms in market and government, such achievement should considerably validate the Party-state's claim that the regime is capable of effectively adapting and responding to the country's evolving development and governance challenges through technocratic strategies as opposed to political liberalization.

That said, the Chinese state's authoritarian interest surely does not align perfectly with its developmental interest, and when political actors have to prioritize among rational pursuits of public welfare and their interests in power and control, the latter is usually predicted to prevail. Although the Chinese state proclaims that it will leave no stone unturned in pursuit of any plausible benefits of using reputation for governance and regulatory purposes, an implicit assumption here has to be that any potential harms and disruptions reputation may cause to the ruling regime needs be manageable. For example, the Party-state will obviously not approve any reputation systems, private or public, to track and rate at least a small group of the country's ruling elites, and perhaps a more extensive network of individuals and entities around them, irrespective of whether that is sound policy to impose on the same transparency and accountability.

More generally, the state's authoritarian interests have led the authorities to perceive a need for a high level of control and assurance over how reputation functions as it becomes integrated into the governance and regulatory process. That may complicate the SCSP's prospect in effectively achieving the state's developmental goals. In one telling example, a senior official at PBOC openly argued that "political correctness" must be ensured when credit agencies design and operate their consumer

credit rating systems.²⁴⁷ By “political correctness” this Chinese official meant a general notion of distributive equality, as he argued that it could be unacceptably discriminatory to assess individuals’ credit status based on their spending habits. ²⁴⁸ Baffling as it may sound, especially as coming from someone who should have a reasonable idea about how credit works, such remark can be more easily understood as expressing concerns about how the reputation market could run counter to both the Party-state’s proclaimed egalitarian commitment and its interest in minimizing the risk of social instability.

C. Bureaucratic Interests

The SCSP is premised on a set of top-level design by China’s central government authorities. But the institutional structure for the various included policy initiatives’ implementation is highly decentralized, with nearly all government bodies along different lines of vertical and horizontal authorities more or less involved in the process. Decentralization inevitably opens the door to a more diverse set of motivations and interests that drive and shape the behaviors of a broad range of government agencies and officials, to which I refer here as “bureaucratic interests.”

It is useful to note, at the outset, that both developmental interests and authoritarian interests are held by not only the country’s top leaders but also sectoral and local government actors, albeit likely to varying degrees. In other words, where local officials see promises from the SCSP’s implementation, they could well be drawn to exploring

²⁴⁷ See *supra* note 92 (PBOC official Wan Cunzhi emphasizing that credit reporting must ensure “political correctness” and “fairness and justice,” by which he meant that people should not be stratified into multiple classes based on who they associate with, where they live, and how much they spend on consumer good, etc.)

²⁴⁸ *Id.*

how reputation may help them improve economic and regulatory performances within their own jurisdictions, or strengthen control over their local constituents. That said, there are other factors that drive specific government actors to devote resources to projects falling under the SCSP's umbrella, and the following can be identified as particularly important.

First, government actors are interested in carrying out the SCSP policy initiatives often because the relevant programs generate particular gains in capabilities and power for these actors. Such gains may include a single agency's access to new sources of data and information by virtue of enhanced surveillance as well as compelled inter-agency sharing. It may also include such agency's augmented coercive power against its own regulatory targets by virtue of its ability to mobilize private reputation sanctions or to tap into enforcement power from other agencies. The court systems' activism in pushing forward the JSR on judgment defaulters are clearly motivated by such prospective gain in institutional capacity. Other government actors also expect to expand their jurisdictional power through the SCSP. The PBOC's interest in developing and regulating the market for private credit systems certainly reflects this logic. Local propaganda authorities' active participation in the substantive design and implementation process for local SCSP programs can also be understood from this angle.

Second, local officials may find it relatively easier to claim credits or score points for themselves by working on SCSP-related programs, in particular as compared with driving hard economic growth nowadays amidst a shift in general and top-level policy

focus from growth to sustainability.²⁴⁹ As the national SCSP policy documents set the tone, through “constructing social trust,” in particular with cutting-edge technological solutions and novel ideas of institutional arrangements, local government officials can showcase to superiors their obedience to the top-down directive as well as their prowess in “social governance innovation.”²⁵⁰ Better yet, compared with the more objective yardstick of GDP growth,²⁵¹ it is much easier for local governments to claim progress achieved for SCSP-related work without the need for producing virtually any hard evidence. In fact, as the central authorities have started to evaluate early mover localities in implementing the SCSP, the publicized evaluation criteria set a low bar for passing, without requiring local officials to conduct validation tests or demonstrate any systemic evidence of impact; instead, a showing of adopting basic technical layouts and a few exemplary cases of application would already seem to suffice.²⁵²

Third, and more easily understandable, the SCSP policy initiatives imply

²⁴⁹ Eswar Prasad, *The Path to Sustainable Growth in China*, Brookings Institute, Testimony to the U.S.-China Economic and Security Review Commission (Apr. 22, 2015), <https://www.brookings.edu/testimonies/the-path-to-sustainable-growth-in-china/>.

²⁵⁰ This term was mentioned quite often in recent years’ State Council’s Work Report to the NPC. *See e.g.* Zhengfu Gongzuo Baogao (政府工作报告) [STATE COUNCIL’S WORK REPORT TO THE NATIONAL PEOPLE’S CONGRESS] (2017).

²⁵¹ GDP, for sure, has its own well-known flaws in measuring governance performance.

²⁵² Guojia Fagaiwei Bangong Ting Zhongguo Renmin Yinhang Bangong Ting Guanyu dui Bufen Shehui Xinyong Tixi Jianshe Shifan Chuangjian Chengshi Kaizhan Disan Fang Pinggu de Tongzhi (国家发展改革委办公厅、中国人民银行办公厅关于对部分社会信用体系建设示范创建城市开展第三方评估的通知) [NDRC OFFICE AND PBOC OFFICE’S NOTICE ON STARTING THIRD PARTY EVALUATION ON CERTAIN SCSP MODEL CITIES UNDER CONSTRUCTION] (Sept. 2016) (setting forth in its appendix measures for the evaluation, which focuses on what SCSP related measures the relevant city has put in place but not on evidence for actual social and economic impact these projects may have had produced).

requirements for new investment in upgrading government ICT infrastructure, in particular at the level of local governments. That provides further public spending power for local officials, who may leverage these new opportunities to exert influence over private sector tech firms, do favors to their connected parties, and extract returns. While there are no statistics on earmarked spending on SCSP-related government tech projects, as the market for China's government informatization is projected to keep growing,²⁵³ many large and small firms are counting on a share of that pie, and the SCSP implementation creates yet a new venue for related rent-seeking activities.

These bureaucratic interests help explain why a considerable amount of government resources have been channeled to the SCSP policy initiatives. But since specific government actors' interest in expanding capabilities and power through the SCSP are parochial in nature, such interest may induce hoarding behaviors, and contribute to collective action problems that undermine interagency collaboration on a larger scale. Meanwhile, policies such as expanding the open government data programs and inviting external oversight on government bodies and officials, which likely have a positive effect on market and government efficiency, may be pursued less enthusiastically by local actors because these measures appear to weaken their power and control.

Moreover, as local governments are tempted to self-promote with presentable, short-term "progress" in implementing the SCSP, they may, as a result, devote less than

²⁵³ Market size of 2018 projected to be 75.4 billion, with CAGR of 7.2% from 2013 to 2018, <http://www.chyxx.com/industry/201701/486324.html>.

necessary efforts to figuring out the harder design questions, such as those in relation to the optimal, or at least reasonably useful scoring formula. Further, while the SCSP's implementation requires proper and efficient technological solutions, the rent-seeking dynamics may also cause less than optimal solutions to become adopted. The new wave of government technological investment spurred by the SCSP thus potentially causes a sizable waste in public spending. In other words, the presence of the bureaucratic interests likely contributes to many of the practical challenges the SCSP currently faces, although, intricately, government reform itself is a key target of the SCSP.

D. Private Business Interests

The foregoing motivational theories have taken the government actors' perspectives. As Creemers argued, China's increasingly influential private ICT companies should also be considered as a critical player in the SCSP.²⁵⁴ To implement SCSP's policy initiatives, including both the more mundane and the conceptually radical ones, government actors often expect to rely on both technical infrastructure and solutions that have to come from the private tech sector.

Given this Article's focus, I here consider the role of China's private business interests primarily in terms of how they affect and shape government behaviors. Home to some of the world's most formidable ICT giants, China in recent years has seen a salient increase of such companies' political clout.²⁵⁵ Entrepreneurs and technologists are constantly invited to lecture both national leaders and local government officials

²⁵⁴ Creemers, *supra* note 15 at 2-7.

²⁵⁵ *Id.*

about how adopting computing and data technologies could bring transformative changes to the market and the state.²⁵⁶ Given that China's central policymakers have since the 1980's formulated a grand developmental strategy to pursue world-class ICT industry as backbones to sustain long-term economic growth,²⁵⁷ it is not surprising that success stories and rosy visions from the private sector have so far had much purchase from China's government authorities. It is now almost tiresome to see countless policy documents from national and local government authorities laden with industry buzzwords such as "big data," "internet of things," "blockchain" and "artificial intelligence."²⁵⁸

In relation to the SCSP, the tech sector's input has obviously shaped the government authorities' generally positive outlook for using reputation tracking and analytics in governance. Since behemoth commercial platforms such as Taobao, TMall, and JD.com can achieve efficiency and order essentially through managing a vast amount of transactions with digitized reputation mechanisms, from the authorities' perspective there seems no principled reason why government agencies, police forces

²⁵⁶ Ma Yun Shouke Baifang Zhengfa Ganjing Shuju Shidai Shi Yuce Weilai de Shidai (马云授课百万政法干警：数据时代是预测未来的时代) [*Jack Ma Gave Lecture to One Million Officials Working in the Judicial System and Said the Age of Data is the Age of Prediction*], *Zhongguo Ribao* (中国日报) [CHINA DAILY] (Oct. 22, 2016), http://www.chinadaily.com.cn/interface/yidian/1120781/2016-10-22/cd_27141399.html.

²⁵⁷ See generally HONG YU, NETWORKING CHINA: THE DIGITAL TRANSFORMATION OF THE CHINESE ECONOMY (2017).

²⁵⁸ See e.g. Guowuyuan Xin Yidai Rengong Zhineng Fazhan Guihua de Tongzhi (国务院《新一代人工智能发展规划的通知》) [STATE COUNCIL NOTICE ON PLANNING FOR THE DEVELOPMENT OF NEW GENERATION ARTIFICIAL INTELLIGENCE] (2017); Guiyang Qukuailian Fazhan he Yingyong Baipi Shu (贵阳区块链发展和应用白皮书) [GUIYANG WHITEPAPER ON DEVELOPING AND APPLYING BLOCKCHAIN TECHNOLOGIES] (2016) (hereinafter **GUIYANG WHITEPAPER**).

and courts cannot do the same.²⁵⁹ In fact, some of the high-profile tech entrepreneurs have even been reported to proclaim, to paraphrase the essence, that “dataism” could ultimately replace the market system with technology-empowered central planning.²⁶⁰ Such a vision could, at a deep level, both inspire and reinforce the central policymakers’ developmental and authoritarian interests in pursuing its technocratic and statist approach to the reputation state.

Besides, the tech firms’ influence also leads to high expectation of concrete government actors for the market players’ capabilities and expertise in overcoming the SCSP’s implementation challenges. On one hand, local government authorities from time to time are emboldened by the lobbying firms to delve into implementing SCSP projects that obviously require greater technological infrastructure and sophistication than they currently possess, counting largely on private actors to bridge the gap with novel solutions. On the other hand, as private firms lobby government actors to adopt their technology and data solutions, or to subsidize their reputation systems with public sector information and incentives, they also tend to oversell the utility of their own

²⁵⁹ See *supra* note 258.

²⁶⁰ Ma Yun Weilai 30 Nian Jihua Jingji Hui Yuelai Yue Da (马云：未来30年计划经济会越来越来) [*Jack Ma Said the Planned Economy Will Continue to Expand in the Next Thirty Years*], *Diyi Caijing* (第一财经) [YICAI.COM] (Nov. 20, 2016), <http://www.yicai.com/news/5162510.html> (Alibaba founder Jack Ma predicting that planned economy will become feasible at a much larger scale thanks to data technology); Liu Qiangdong Gongchan Zhuyi Jiang Zai Women Zhedai Shixian Gongsu Quanbu Guoyou Hua (刘强东：共产主义将在我们这代实现 公司全部国有化) [*Richard Liu Said Communism Will Become Realized in Our Generation and His Company Will Eventually Become Nationalized*], *Xinlang Keji* (新浪科技) [SINA TECH] (Aug. 19, 2017), <http://tech.sina.com.cn/i/2017-08-19/doc-ifykcypq0328162.shtml> (JD.com founder Richard Liu claiming that communism will become plausible as data technology advances).

technologies, fanning further interests from officials in pursuing data-driven reputation. Moreover, since systematic validation tests have not been requisite for government officials to claim success, spending on conceptually most novel technologies, regardless of their practical utility or suitability, for its own sake comport with the government officials' interest in presenting themselves as progressive and sophisticated before both their higher-ups and constituents.

In this vein, China's private tech players have played an important role in stimulating and reinforcing the Chinese state and government actors' developmental, authoritarian and bureaucratic interests in the SCSP. In return, tech firms have obtained not only business opportunities but also access to the government agenda-setting process. The influence, meanwhile, is not unidirectional, as the private firms actively attempt to formulate and adjust their own strategies in accordance with their perception of government interest. For example, although the rapid development of "Internet-based finance" and big data credit assessment industry was where the PBOC initially took cue as it considered establishing the pilot consumer credit programs, once the PBOC signaled its interest in having credit agencies more independent than those affiliated with tech giants, the latter quickly moved forward to put together a proposal for a jointly invested "credit union," which however would never have been considered an option had the authorities not revealed such preference.

Another telling example relates to the way in which blockchain technologies are proposed for adoption in both the SCSP and other regulatory and market contexts. Private sectors since 2016 have started to pitch blockchain to China's national and local

government authorities.²⁶¹ While blockchain technologies are generally understood to associate with a distributed data structure, FinTech entrepreneurs, knowing Chinese authorities' obvious preference for centralization, strategically highlight in their pitch to government authorities blockchain's virtue primarily from the angle of data accuracy, reliability, and security, whereas significantly downplay or even deny implications relating to blockchain's inherent logic of decentralization.²⁶²

V. THE REPUTATION STATE'S PATH FORWARD: PROMISES AND CHALLENGES

The SCSP has aroused high hopes and deep concerns. While the Chinese government has expressly set the target as putting in place the major parts of a comprehensive social credit system by 2020,²⁶³ it is still premature to determine what potential impact the SCSP could eventually have in the country's social, economic, and political spheres. But with the information available at this stage, we should nonetheless be able to try envisage some plausible futures for the reputation state's China model.

As previously noted, observers and commentators from outside of China have so far focused on highlighting the looming threats posed by the SCSP to human rights and

²⁶¹ See e.g. GUIYANG WHITEPAPER, *SUPRA* NOTE 258.

²⁶² In Guiyang's Whitepaper on Blockchain, which was officially released by the government but authored to a large degree by private firms collaborating with the government, the most eye-catching concept proposed is one of "sovereign blockchain," which should sound as quite an oxymoron to technologists in the Western context. See *id.* See also 2017 Shubo Hui Yantao Zhuquan Qu Kuai Lian Guanli yu Yingyong Chuangxin Fazhan (2017 数博会——研讨区块链主权管理与应用创新发展) [2017 Data Expo: Deliberating on the Sovereign Management and Innovative Development of Blockchain Technology], Souhu (搜狐) [SOHU.COM] (May 3, 2017), http://www.sohu.com/a/137974087_675950. *Contra* HANS-HERMANN HOPPE, *DEMOCRACY: THE GOD THAT FAILED* (2001).

²⁶³ 2014 BLUEPRINT, PART I.3.

liberty. This Part V offers initial thoughts on the SCSP's plausible implications in three other areas that are important but inadequately explored, relating in broad terms to government expansion and efficiency, optimal approach to enforcement, and intragovernmental agency control. As the below discussion leaves many questions open, the primary objective here is to identify these important perspectives for advancing future normative thinking on the SCSP as well as the reputation state's rise in the global context.

A. Government Expansion and Efficient Governance

Let us now take a step back and ponder in the abstract: Does the SCSP's approach to the reputation state make sense to begin with? Besides the described practical challenges, could reputation even in theory become used by the state effectively as an instrument for public governance? While different angles exist for thinking about these questions, I here propose one that draws upon the theoretical discussion about the general relationship between public governance and private ordering.

Legal theories have thus far adopted a largely dichotomous model about the sources of social order, and such model contrasts the two major modalities of governance in a given society, namely the state's centralized imposition of legal commands and the spontaneous, decentralized emergence of private ordering, including those facilitated by social norms and reputation mechanisms.²⁶⁴ While theorists' normative views about

²⁶⁴ *But see* Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328 (2004) (discussing another source that is organizational). Here I bracket the discussion about organizational/corporate orders given the focus is on examining forces within and outside of the formal institutions of the state.

how these two sources of social order relate to each other have evolved over time,²⁶⁵ the paradigmatic neoliberal thinking, as reflected in a substantial literature on law and social norms, has emphasized the efficiency advantages of private ordering and the importance that formal legal institutions recognize and support such “order without law.”²⁶⁶ Representing this perspective, Robert Cooter once argued that in an increasingly complex economy the importance of decentralized order will keep growing as the state becomes less capable of gathering enough information or creating sufficient motivation through centralized governance.²⁶⁷ He proposed, accordingly, that the state in solving the society’s governance problems should do more to facilitate the decentralized mode of legal order, such as through creating markets and enacting customs.²⁶⁸

Social norm scholarships along these lines typically concern more than reputation *per se*, but the neoliberal perspective on the reputation’s role in governance often reflects the same outlook. As facilitated by new technologies, reputation has become increasingly produced in the market and functioned as a prevalent force undergirding self-governance. The normatively desirable governance pattern the state may pursue, accordingly, could be one of “less regulation, more reputation”: The state could expect

²⁶⁵ See e.g. Robert D. Cooter, Structural Adjudication and the New Law Merchant: A Model of Decentralized Law, 14 Int’l Rev. L. & Econ. 215, 216 (1994) (“Many intellectuals believe that centralized law is inevitable, just as they once believed that socialism was inevitable.”).

²⁶⁶ SEE ELLICKSON, SUPRA NOTE 24.

²⁶⁷ Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 23 U. PA. L. REV. 1643, 1644-46 (1993).

²⁶⁸ *Id.*

to further economize its formal legal and regulatory apparatus by reducing direct intervention in socio-economic activities and instead support reputation-based private ordering in many a regulatory space.²⁶⁹

In light of such theoretical understanding about governance efficiency, one intuition here is thus that China's model for its reputation state could be doomed at the outset. On papers, the SCSP's planners might as well have been inspired by the potential efficiency advantages of increased self-governance through reputation: As the 2014 Blueprint briefly yet unequivocally asserted, one objective of the SCSP is to "reduce government interventions in economic affairs" through promoting credit agencies and reputation systems.²⁷⁰ But what the Chinese government overall expects from reputation, in fact, is a vehicle for expanding the reach of government and law. Drawing on private reputation, the state eyes on more pervasive surveillance capabilities over many social and economic realms that are previously obscure to the state, as well as a greater variety of tools for creating targeted and precise behavioral incentives. These strengthened capabilities, if acquired by the state, may certainly allow it to breach existing boundaries between public governance and private ordering, with the latter potentially becoming subsumed into the former. In this way, "more reputation," as the Chinese state envisions, is to eventually serve its purpose to have "more regulation," or greater capabilities to arrange social orders from the center of the power.

While such vision of the Chinese state has been critiqued much for its implications

²⁶⁹ Lior Jacob Strahilevitz, *Less Regulation, More Reputation*, in THE REPUTATION SOCIETY, *SUPRA* NOTE 6 AT 72.

²⁷⁰ 2014 BLUEPRINT, PART I.2 (Noting that the SCSP is urgently called for so as to reduce government intervention in economic affairs).

on civil liberties,²⁷¹ from the governance efficiency perspective, is it also just one more example of flawed and unrealistic policy thinking that, as Cooter would have said, ignores the implausibility of legal centrism and, more generally, the planned economy?²⁷² While this Article has described multiple practical roadblocks to China's pursuit of a reputation state, whether there could be a plausible pathway from "more reputation" to "more regulation" could use some further theoretical deliberation. Recall that the neoliberal perspective starts from the assumption that a state has fundamentally limited information and as a result is unable to effectively monitor many spaces of socio-economic life but for private reputation's mediation. As private reputation continues to proliferate and systemize, however, the increasing amount of reputation by themselves will make the state ever more informed than before, and that in turn, perhaps paradoxically, could enable an increasingly higher level of interventionism.²⁷³ In particular, if the state has the technical means to not only monitor private reputation but also apply predictive analytics to effectively understand, in a timely manner, how the underlying behavioral patterns evolve, then over the course of a dynamic process, "more reputation" does seem to plausibly allow the state to design and implement "more regulation," in a centralized and efficient manner.

In more abstract terms, the equilibrium of how an efficient social order consists of public versus private governance often shifts, and in theory reputation and related

²⁷¹ *Supra* note 14.

²⁷² In fact, as mentioned, high-profile Chinese tech entrepreneurs have recently been even reported to proclaim, to paraphrase the essence, that "dataism" could somehow eliminate the need for the market, with efficiency achieved through technology-empowered central planning. *See supra* note 260.

²⁷³ *Cf. PICCI, SUPRA NOTE 12 AT 180.*

technologies may add to the reason for portending that the shift could be in a direction different from what the neoliberal theory predicts and recommends. In fact, in recent years, such possibility has been foreshadowed by legal scholars who attempt at conceiving some radical prospects for legal developments resulting from the use of big data analytics.²⁷⁴ Provided that laws are to be designed and implemented by authorities of formal institutions that have low-cost access to information, computing power, and communication infrastructure, as these scholars explain, the legal system could expect to become more capacious as it rids itself of much of the currently intractable tradeoffs, including but not limited to those associated with arbitrary line drawings, *post hoc* discretions, and sacrificing contextual flexibility for formal certainties.²⁷⁵

Those theoretical discussions seem to suggest that, with powerful technological tools, the *modus operandi* of law could be transformed into something very much resembling private reputation as the centralized legal system now can regulate also in a manner that is more informed, sensitive to context, and dynamic than how it has been typically perceived. In other words, the reputation state, as it keeps progressing, is likely the actual path law and governance will take towards their expected future of personalization.²⁷⁶ If that's true, a greater level of centralization in social order, as

²⁷⁴ See e.g. Omri Ben-Shahar & Ariel Porat, *Personalizing Negligence Law*, 91 NYU L. REV. 627 (2016); Anthony Casey & Anthony Niblett, *The Death of Rules and Standards* (Coase-Sandor Working Paper Series in Law and Economics No. 738, 2015); John O. McGinnis & Steven Wasick, *Law's Algorithm*, 66 FLA. L. REV. 991, 998 (2014); Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1476 (2014) (developing a comprehensive framework for understanding the theoretical and practical issues arising in the implementation of personalized default rules).

²⁷⁵ *Id.*

²⁷⁶ *Id.*

China is apparently pursuing through the SCSP, is plausibly efficient. And in case useful technological upgrades and favorable political conditions coincidentally align in the future, the SCSP may offer us a first set of validating insights about whether and to what extent the state could indeed efficiently intervene in areas normally considered as better governed through private ordering. The case for an efficient expansion of public governance will be supported if, for example, a considerable number of government-generated reputation becomes voluntarily adopted by private decisionmakers, or systematic evidence emerges to show that beneficial behavioral changes are induced by reputation-based, precisely targeted government sanctions and incentives.

Nonetheless, it should be obvious that even if government actors do acquire sophisticated technologies and *can* learn about the specific need for order from every corner of the marketplace and society, they are not always sufficiently motivated to serve such need in the most efficient manner. The incentive issue, in other words, could be structural as opposed to technical, perhaps unless fully automated governance becomes instituted. For that very reason, we may also predict that even the government intends to fully replace private reputation with public reputation, private reputation could continue to emerge as decisionmakers work around or sidestep those public reputation systems that fail to serve the society's needs for order and governance.²⁷⁷

Moreover, technologies not only enable the state to expand, but they also potentially

²⁷⁷ In Qingzhen, for example, anecdotal reports suggest that what villagers in their daily life are most concerned is not necessarily the reputation score they receive from the government SCSP program but rather still the informal and not systemized reputation among their peers as being reliable or not, because the latter is what that will actually determine whether they may get help from their neighbors at such time of need as organizing weddings and funerals.

empower private reputation to reclaim from time to time its comparative advantages over public governance. Such dynamics will add to uncertainties about where we may actually find the new equilibrium, resulting from the technological disruptions, for the efficient governance paradigm with law and reputation.

In this vein, one potential peril in the outlook for China's reputation state is that government actors move too fast on generating government reputation, which could result in the influx of too much noise, the creation of entrenched interest, and the crowding out of private incentives. A more robust private reputation market, as a result, could be prevented from ever coming to shape as a result. But for a reputation state to rise and operate efficiently, a robust private reputation market appears indispensable: A reputation market supports government reputation systems with the necessary information input and efficacy checks, even if government reputation could, in theory, be made more sophisticated than their current forms through future technological upgrades.

B. Force and Choice in Enforcement

The SCSP aims to use reputation to tighten the Chinese governments' loose end in enforcing its laws and regulations. But how effectively can that be achieved? Even assuming a certain level of efficacy is within reach, to what extent is it desirable to equip government actors with reputation tools to impose higher-powered incentives on their regulatory subjects and therefore make laws and regulations bite harder than before?

The efficacy question is ultimately empirical and needs to be investigated in the

context of concrete policy programs. As earlier discussion has indicated, the successful implementation of reputation-based schemes such as the JSRs hinges not only on proper technical design for generating and disseminating reputation information on regulatory subjects but also on effective institutional arrangements for cross-agency coordination and collaboration. It is much easier for JSRs to overcome these two difficulties where they operate to address a single issue or among a limited number of reciprocal agencies. It yet calls for a much higher level of technical sophistication and political capital to effectively design and implement a system of universal social credit scores for the use across an entire government, either within a locality or nationwide. One prediction here is thus that the smaller scale, sectoral, blacklist-based JSRs will dominate in the near term, whereas the more comprehensive scoring and rating systems, even set up, could largely be in the nature of vacuous, propaganda projects.

The harder question here, however, concerns how government actors may actually do with their increased enforcement capabilities by virtue of these reputation-facilitated institutional arrangements. Even under the smaller JSRs, regulatory subjects can still expect to face more powerful incentives now than before. As noted, there are likely developmental benefits from having law and regulation in some areas to bite harder in China which, as many other low and middle-income countries, still wrestles with the problem of deficient legal protection of person, property, and the environment.²⁷⁸ But

²⁷⁸ See e.g. Benjamin van Rooij & Lesley K. McAllister, *Environmental Challenges in Middle-Income Countries: A Comparison of Enforcement in Brazil, China, Indonesia, and Mexico*, in LAW AND DEVELOPMENT OF MIDDLE INCOME COUNTRIES, SUPRA NOTE 238 AT 288 (“enforcement is a key weak link in the chain of the possible social, market and state regulatory forces that could help mitigate pollution.”); Erin Ryan, *The Elaborate Paper Tiger: Environmental Enforcement and the Rule of Law in*

what should be obvious is that all cases of under-enforcement are not identical in their welfare implications.²⁷⁹ And the situation in China may be particularly delicate as both individuals and business firms have long managed to exploit authorities' laxity in enforcing formal law and regulation for a breathing room to exercise individual liberties, make practical business arrangements, and explore market and technological innovations.²⁸⁰

For well-known examples, while China is notorious for having draconian rules over online speech, most web users have never run into serious troubles²⁸¹ for contributing their shares to the overall vibrant public discourse, much of which however can be technically sanctioned against under the government's deliberately overbroad and vaguely phrased regulatory restrictions. In the urban housing market, massive residential communities were built in violation of technically restrictive zoning codes, with government regulators failing to enforce the prohibitive rules in the first place and seeking ways to validate related property interests only afterward.²⁸² In the corporate

China, 24 DUKE ENVTL. L. & POL'Y F. 183, 193 (2013) (reviewing the unfolding crisis of public confidence in the enforcement of environmental laws against polluters).

²⁷⁹ Frank Pasquale & Glyn Cashwell, Four Futures of Legal Automation, 63 UCLA L. Rev. Discourse 26, 45 (2015) (Artificial intelligence is likely to also miss out on essential policy questions that could be controlling in a case--for instance, for certain administrability, efficiency, or fairness reasons, the rigid rule should not apply to a specific set of facts). *Also cf.* Michael L. Rich, Should We Make Crime Impossible?, 36 Harv. J.L. & Pub. Pol'y 795, 847 (2013) (showing that even perfectly enforce drunk driving law may give rise to a tangle of constitutional, legal, and policy issues.)

²⁸⁰ Ethan S. Bernstein, *The Transparency Paradox: A Role for Privacy in Organizational Learning and Operational Control*, 57 ADMIN. SCI. Q. 181, 202-04 (2012).

²⁸¹ Other than the annoyance of seeing their controversial posts removed or, in relatively more serious situations, accounts being shutdown, by social media operators.

²⁸² Shitong Qiao, *Dealing with Illegal Housing: What Can New York City Learn from Shenzhen?*, 43 FORDHAM URBAN L. J. 743 (2017).

market, while China's Company Law used to impose a series of inefficient mandatory legal capital requirements, firms in practice have widely evaded such laws and faced only spotty prosecutions.²⁸³ Moreover, the rise of China's Internet giants in the late 1990s and early 2000s are arguably attributable to the fact that copyright laws and regulations were then not stringently enforced against them.²⁸⁴

In all these examples, note that the laxity in enforcement of relevant laws and regulations typically stems from two factors. One is the relevant authorities' lack of resources and technical capabilities required to meaningfully keep track and intervene with sufficient coercive force.²⁸⁵ The other, as demonstrated and argued in case studies, is certain authorities' deliberate choice made in accordance with their policy preferences.²⁸⁶ These two factors are not mutually exclusive, and may simultaneously present in a single case, which then allows the authorities to take an ambivalent stance and muddle through a regulatory task. The new enforcement paradigm based on reputation tracking and higher-powered incentives, in particular if aided by powerful technological solutions, means that the first factor will become much less a hindrance to enforcement. Instead, the authorities' strategic choice about where to deploy the reputation-enabled regulatory capacities will be more consequential than ever.

²⁸³ Sang Benqian (桑本谦), *Falv Jingjixue Shiye Zhong de Gongszi Ziben Zhidu Gaige* (法律经济学视野中的公司资本制度改革) [*A Law and Economics Perspective on the Reform of Corporate Capitalization Rules*], *Zhongguo Falv Pinglun* (中国法律评论) [CHINA LAW REVIEW], no.4, 2017.

²⁸⁴ Hu Ling (胡凌), *Feifa Xingqi: Lijie Zhongguo Hulian Wang Yanjin de Yige Shijiao* (非法兴起: 理解中国互联网演进的一个视角) [*Rising Illegally: One Way to Understand the Evolution of Internet in China*], *Wenhua Zongheng* (文化纵横) [BEIJING CULTURAL REVIEW], no.5, 2016 at 124-25.

²⁸⁵ See e.g. *supra* note 283.

²⁸⁶ See e.g. *supra* note 284.

At one level, such choice has important welfare implications. Near perfect enforcement of laws, even were it attainable, would seldom be optimal, not only because of the direct cost of resources spent on enforcement action,²⁸⁷ but also because the welfare effect of legal rules cannot be presumed to be static and some breathing room hence is often needed to accommodate subversive but creative responses.²⁸⁸ Moreover, even impartial legal authorities would be unable to ensure that only optimal laws are kept in place, and in reality there could be a substantial risk that biased or self-interested enforcers would selectively upend enforcement against the public welfare interest. Meanwhile, such choice may also raise distributive concerns. In particular, although in case-by-case advocacy terms it is usually not a good argument to contest the law's enforcement on one person by citing it was not enforced on others, from a systematic and longitudinal perspective economic regulation on a particular sector that becomes more restrictive only over time may help entrench early movers and reduce opportunities for startups and new entrants.²⁸⁹

In that vein, we may predict that in the near term the SCSP's implementation will lead to the proliferation of simplistic JSRs by sectoral and local authorities, because not

²⁸⁷ See George J. Stigler, *The Optimum Enforcement of Laws*, 3 J. POL. ECON. 526 (1970); Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and the Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45 (2000).

²⁸⁸ Cf. Julie E. Cohen, *What Privacy Is for*, 126 HARV. L. REV. 1904, 1918 (2013) (Innovation also requires room to tinker, and therefore thrives most fully in an environment that values and preserves spaces for tinkering. A society that permits the unchecked ascendancy of surveillance infrastructures, which dampen and modulate behavioral variability, cannot hope to maintain a vibrant tradition of cultural and technical innovation.)

²⁸⁹ China's Internet market, as earlier mentioned, illustrates clearly this pattern. See *supra* note 284.

only could these lower level authorities intend to acquire or even abuse the strengthened enforcement capabilities, but incumbent players in many market contexts may also actively support or lobby local or sectoral regulators to acquire and utilize such reputation-based enforcement capabilities. Such development is unlikely desirable. In the short term, if the expansion of JSRs outpaces the growth of the actual enforcement capabilities within the government system, many JSRs established could become superfluous, causing much waste in institutional efforts. In the long run, however, the risk of over-enforcement looms larger. Both issues suggest that the potential increase in enforcement capabilities will cast a light on the need for policymakers to work out the state's regulatory priorities at a higher level. This suggests that the institutional structure for the SCSP's design and implementation inevitably will be under pressure towards a greater level of centralization.

C. Intra-Governmental Agency Control

One objective of China's national authorities in rolling out the SCSP is to strengthen their control over lower level government bodies and officials. Such objective is expected to become facilitated by deploying systematic tracking of the latter's reputation within and outside of the government systems and constraining their exercise of power through requiring the use of reputation in their decisionmaking activities.

As earlier noted, some types of SCSP-directed disclosures, such as those about government actors' particular "trust-breaking conduct," reportedly have created notable pressure on local officials.²⁹⁰ But short of pushing for even more generalized open

²⁹⁰ Hu Jinwu & Qin Hong (胡锦涛 秦宏), *Liaowang Toushi Difang Zhengfu Shixin*

government data than under the current open information regime, the SCSP's incremental contribution to improving government transparency and strengthening external constraints on government conduct may not be significant for its own sake.

Yet besides improving government transparency, reputation could serve a tool for agency control also because it creates a plausible venue for higher authorities to intervene in and check on its lower-level agent's decisions and actions. Provided it is generated upon aggregating and analyzing a large amount of behavioral and circumstantial information, reputation is, in most cases, less arbitrary a basis for decisionmaking than, say, an official's snap judgment, selfish interest, or favoritism based on personal and familial ties. The requirement for Chinese government actors, especially those operating at the local levels, to consult reputation should thus function as a useful constraint on their exercise of power in determining, for example, who among the local residents will be given access to government incentives, contracting opportunities, or expedited processing for administrative approvals. In this vein, the SCSP essentially adds a further layer of discipline over government officials' discretionary power. And while current arrangements often remain fairly low-tech, central policymakers clearly envision a certain level of automation in the future for the generation and use of reputation in the government decisionmaking process.²⁹¹ To the

Beihou de Nanyan zhi Tong (瞭望：透视地方政府失信背后的“难言之痛”)
[*Perspectives on the Intricacies Underlying the Trust-Breaking Behaviors of Local Government*], Peng Pai (澎湃) [THE PAPER] (Apr. 10, 2017),
http://www.thepaper.cn/newsDetail_forward_1658701 (noting that some local officials complained about being blacklisted).

²⁹¹ See e.g. STATE COUNCIL NOTICE ON PLANNING FOR THE DEVELOPMENT OF NEW GENERATION ARTIFICIAL INTELLIGENCE (2017).

extent that reputation becomes automatically factored into local government actors' decisionmaking process, the room for arbitrariness and abuses in local officials' behaviors, which the Chinese public has long complained, could be considerably reduced.

Unlike in the Western contexts, where legal restrictions and social protests against automated decisionmaking are sometimes instituted to validate values of dignity, decency, and equality,²⁹² realistically there is not much reason to think that China's governmental process would be more progressive were it to continue operating in a mode with less tracking and automation. In fact, as preliminary evidence from e-government projects shows, such line of efforts have proven to have a positive effect on policing official behaviors.²⁹³

That said, however, inherent limits to the SCSP's technocratic approach to pursuing government reform and more effective internal control should not be difficult to discern. For starters, as Chinese authorities consider bringing reputation, whether generated from private or public sources, into their decisionmaking processes, there are obvious challenges for them to effectively minimize room for discretion and manipulation in the process of data collection. Even in agencies with more rigorous digitized record systems, such as the police departments, since whatever data gets into the systems now become much harder to alter or delete than before, political pressures and maneuvers have observably shifted back to the point right before the data entry takes place. In fact,

²⁹² Zarsky, *supra* note 69 at 1551-52; EUBANKS, *SUPRA* NOTE 71.

²⁹³ SCHLAEGER, *SUPRA* NOTE 214.

as anecdotal evidence suggests, local government authorities from time to time could manage to use their influence over courts to prevent information of their officials from being entered into the blacklist for judgment defaulters in the first place.²⁹⁴ And it should not be surprising at all to find similar practices in relation to the generation and use of blacklists in other contexts too. More generally, given that a number of aspects of China's government system, especially at the top level, are deliberately kept opaque or secret from the public eye, the constant maneuvering over what does or does not get into the more digitized and automated parts of the government process remains profoundly political as opposed to technical.

Meanwhile, as reputation increasingly operates with scoring formula or algorithms, designing the relevant rules surely involves a considerable amount of human discretion and judgments.²⁹⁵ We have seen that China's government actors, such as those of Suining and Qingzhen, are not actually able, at the current stage, to design more than those crude and arbitrary scoring rules for reputation systems based on officials' preferences and intuitions. But even where government agencies are humble enough to refrain from the almost Sisyphean endeavor of creating optimal scoring algorithms, and instead consult and incorporate private reputation, they still need to make important judgments about how reliable their private sector reputation vendors are.²⁹⁶ Such judgments by local level government actors, without doubt, can still be discretionary in nature and potentially also influenced by private interest, errors, and biases.

²⁹⁴ Anecdotes obtained from interviews during fieldwork.

²⁹⁵ See Citron & Pasquale, *supra* note 43 at 5.

²⁹⁶ Brauneis & Goodman, *supra* note 71.

Note that in China's case, the aforementioned discretionary space for lower-level government agents may be feasibly reduced further through technological solutions. For example, more stringent dataveillance can be applied to the data generation process through deploying facial recognition systems and IoT sensors at a large scale.²⁹⁷ Adapting some of the storage and authentication functionalities, as enabled by the blockchain technologies, to the SCSP's data system could potentially reduce data manipulability and enhance data integrity.²⁹⁸ The use of machine learning algorithms and smart contracts, as opposed to largely human designed and applied rules, in generating reputation and making decisions, may also partially reduce the impact of human biases, errors, and manipulations. As relevant ideas and proposals are now being put forward by tech firms, the government actors have indicated in broad terms their interest in adopting these technical solutions.²⁹⁹

Nonetheless, what should be clear is that those technological solutions, even if all effectively deployed, may not address for their own sake the fundamental political judgment that must be made here. As of this writing, no formal and coherent institutional arrangements have been settled for the SCSP with respect to how the structural powers of defining reputation, allocating reputation incentives, and controlling data storage and use are to be divided between central and local authorities. And given that all branches and levels of government actors have since the start been

²⁹⁷ See e.g. Lubman, *supra* note 176 (trend for a wider scope of application for facial recognition technologies)

²⁹⁸ *Digital Blockchain Based Identification and Reputation Models*, THE BLOCKCHAIN: A GUIDE FOR LEGAL & BUSINESS PROFESSIONALS § 6:2.

²⁹⁹ See *supra* note 291.

pushed to move first and fast on their own course to implement the SCSP projects, as previously described, the generally lack of interoperability among different sectoral and local reputation systems not only limits these systems' practical utility but also potentially renders them semi-black boxes that make it more difficult, rather than easier, for higher authorities to check on their subsidiaries.

Predictably, therefore, the SCSP can serve in the future as a new battleground in the perennial struggle for power between the center and peripheral within China's political system.³⁰⁰ Aside of the central government's repeated yet by far fruitless urges for greater interagency information sharing across sectoral and regional jurisdictions, it is unclear at this point how the national government may be able to eventually centralize control over the creation and use of reputation at the subsidiary levels and branches. In some sense, this suggests that a key roadblock for China's central authorities to overcome in using reputation to strengthen intragovernmental agency control turns out, in fact, to be exactly the agency problem itself.

VI. CONCLUSION

This Article presents a first study that comprehensively examines China's SCSP, a recent and remarkable case illustrating the broad trend in using reputation mechanisms in governmental spheres. By assertively placing government actors' in the driver's seat

³⁰⁰ See generally ZHENG YONGNIAN, *DE FACTO FEDERALISM IN CHINA: REFORMS AND DYNAMICS OF CENTRAL-LOCAL RELATIONS* (2007); Wang Shaoguang, *The rise of the regions: fiscal reform and the decline of central state capacity in China*, in *THE WANING OF THE COMMUNIST STATE: ECONOMIC ORIGINS OF POLITICAL DECLINE IN CHINA AND HUNGARY* (Andrew G. Walder (ed.), 1995). *Contra* Huang Yasheng, *Central-Local Relations in China During the Reform Era: the Economic and Institutional Dimensions*, 24 *World Development* 655 (1996).

of the country's reputation revolution, the SCSP offers us a unique opportunity to observe promises and challenges of the rising reputation state. In its current form, the SCSP has a reasonable chance to facilitate some of the Chinese state's developmental objectives, such as fostering a more expansive and functional reputation market and modernizing the government data practices. The pursuit of transformative changes to market and government institutional efficiency, however, is facing challenges that call for not only technical solutions but also difficult policy and political choices.

The clock is now ticking for the Chinese government to reach the milestone of 2020, as it sets for itself, when the SCSP is to accomplish building the fundamental infrastructure for reputation-based governance over virtually all public, social and economic spheres. No matter what could actually be put together in less than two years' time from now, for a long time to come there is much more we will be able to learn from the SCSP about the reputation state's realistic process and impact. For those interested in pursuing a fruitful research agenda on this topic, multiple promising paths for future studies may well be identified here. First, detailed documentation of progress, impediments, and institutional dynamics are worth performing to further enrich our understanding of the SCSP policy initiatives at the operational level. Second, systematic empirical investigations on the actual behavioral and market impact of specific SCSP programs may become feasible in the future. Third, normative theories about the reputation state can be more thoroughly developed as the SCSP's actual impact on social welfare and distributive fairness become more clearly manifested. Fourth, comparative studies can be performed on similar developments relating to the use of

reputation-based governance techniques and paradigms in more countries from both the West and the developing world.